TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1919

No. [redacted]250

THE CITY OF LOS ANGELES ET AL., APPELLANTS,

vs.

LOS ANGELES GAS & ELECTRIC CORPORATION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

FILED NOVEMBER 12, 1917.

(26,227)

(26,227)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 760.

THE CITY OF LOS ANGELES ET AL., APPELLANTS,

vs.

LOS ANGELES GAS & ELECTRIC CORPORATION.

PEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print
ption	1	1
tation and service	3	1
mes and addresses of counsel	6	2
ll of complaint for injunction	8	4
Exhibit A—Writ of temporary injunction issued by Superior Court of Los Angeles County	35	22
B—Judgment of Superior Court	37	23
C—Restraining order of Superior Court	40	25
D—Ordinance No. 36125 (new series), ordinance providing for the removal or relocation of poles, &c., March 7, 1917	43	27
E—Agreement between Pacific Electric Railway Co. and Los Angeles Inter-Urban Ry. Co., October 10, 1906	47	29
F—Agreement between Pacific Electric Railway Co. *et al.* and The Los Angeles Pacific Company, November 5, 1907	60	39
davit of C. A. Luckenbach	62	41

D & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 21, 1917.

	Original.	Pr
Affidavit of E. R. Northmore	67	
Order to show cause and temporary restraining order	72	
Answer of the defendants	77	
Statement of evidence	92	
Stipulation of fact	92	
Ordinance No. 36125 (new series), an ordinance providing for the removal or relocation of poles, &c., March 6, 1917	93	
Complaint for injunction	97	
Writ of temporary injunction issued by Superior Court of Los Angeles County	111	
Writ of permanent injunction by Superior Court	115	
Minutes of meeting of the Board of Public Works of the City of Los Angeles, March 23, 1917	119	
Agreement between Pacific Electric Railway Co. and the Los Angeles Pacific Railway Co., October 10, 1906	121	
Testimony of E. R. Northmore	135	
General order No. 26 of the Railroad Commission of California	157	
Testimony of E. F. Scattergood	161	
R. H. Manaham	165	
C. W. Coiner	171	
Stipulation to statement of evidence	175	
Judge's approval of statement of evidence	176	
Opinion, Bledsoe, J.	177	
Decree	193	
Writ of injunction	201	
Marshal's return of service	203	
Petition for appeal	205	
Assignment of errors	207	
Order allowing appeal	218	
Bond on appeal	219	
Stipulation for removal of exhibits	222	
Order allowing removal of exhibits	224	
Praecipe for record	226	
Clerk's certificate	228	

1&2 Supreme Court of the United States.

THE CITY OF LOS ANGELES, a Municipal Corporation; FREDERICK T. WOODMAN, as Mayor of The City of Los Angeles; Board of Public Works of The City of Los Angeles and Lorin A. Handley, Patrick P. O'Brien, and Owen McAleer, Members of and Constituting the Board of Public Works of The City of Los Angeles, Department of Public Service of The City of Los Angeles, and Reginald F. Del Valle, Louis H. Valentine, Meredith P. Snyder, John W. Kemp, and Bryon Erkenbrecher, Members of and Constituting the Board of Public Service Commissioners of The City of Los Angeles; The Council of The City of Los Angeles, and Martin F. Betkouski, James S. Conwell, Frederick C. Langdon, Estelle Lawton Lindsey, Robert T. Brain, William A. Roberts, Foster C. Wright, Fred C. Wheeler, and John Topham, as Members of and Constituting the Council of The City of Los Angeles; John L. Butler, Chief of Police of The City of Los Angeles, and Ezra F. Scattergood, Chief Electrical Engineer of the Bureau of Power and Light of The City of Los Angeles, Appellants,

vs.

LOS ANGELES GAS AND ELECTRIC CORPORATION, a Corporation, Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

3 In the District Court of the United States in and for the Southern District of California, Southern Division.

No. D-23. In Equity.

LOS ANGELES GAS & ELECTRIC CORPORATION, a Corporation, Complainant,

vs.

THE CITY OF LOS ANGELES, Municipal Corporation, et al., Defendants.

Citation on Appeal.

To the Complainant, Los Angeles Gas & Electric Corporation, a Corporation, and to Messrs. Herbert J. Goudge, Paul Overton and H. C. Beach, Its Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of

Washington, in the District of Columbia, on the 16th day of November, 1917, pursuant to an order allowing an appeal filed and entered in the clerk's office of the District Court of the United States, in and for the Southern District of California, Southern Division, from a final decree signed, filed and entered on the 15th day of June, 1917, in that certain suit, being In Equity No. D-23, wherein The City of Los Angeles, a municipal corporation et al., are defendants and appellants, and you are the complainant and appellee, to show cause, if any there be, why the decree rendered against the said appellants as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness the Honorable Benjamin F. Bledsoe, United States District Judge for the Southern District of California, Southern
4 Division, this 17 day of September, 1917, and of the Independence of the United States, the one hundred and forty-first.

BLEDSOE,
United States District Judge for the Southern District of California, Southern Division.

5 [Endorsed:] Original. No. D-23. In the District Court of the United States in and for the Southern District of California, Southern Division. Los Angeles Gas & Electric Corporation, Complainant vs. The City of Los Angeles, a Municipal Corp., et al., Defendants. Citation on Appeal. Received copy of the within Citation on appeal this 19 day of Sept., 1917. H. C. Beach, Herbert Goudge, Paul Overton, Attorney- for Complainant. Albert Lee Stephens, City Attorney, 300 Hosfield Bldg., Los Angeles, Cal. W. B. Mathews, Attorney for Defendants, Knickerbocker Bldg. Filed Oct. 18, 1917. Wm. M. Van Dyke, Clerk, by Chas. N. William, Deputy Clerk.

6 Names and Addresses of Attorneys.

For Appellants:

Albert Lee Stephens, Esq., City Attorney, 300 Hosfield Building, Los Angeles, California.

W. B. Mathews, Esq., Merchants National Bank Building, Los Angeles, California.

William B. Himrod, Esq., Lewis E. Whitehead, Esq., Los Angeles, California.

For Appellee:

H. C. Beach, Esq., Paul Overton, Esq., Herbert J. Goudge, Esq., 645 South Hill St., Los Angeles, California.

In the District Court of the United States of America in and for the Southern District of California, Southern Division.

No. D-23. Equity.

s Angeles Gas and Electric Corporation, a Corporation, Complainant,

vs.

e City of Los Angeles, a Municipal Corporation; Frederick T. Woodman, as Mayor of The City of Los Angeles; Board of Public Works of The City of Los Angeles and Lorin A. Handley, Patrick P. O'Brien, and Owen McAleer, Members of and Constituting the Board of Public Works of The City of Los Angeles, Department of Public Service of The City of Los Angeles, and Reginald F. Del Valle, Louis H. Valentine, Meredith P. Snyder, John W. Kemp, and Bryon Erkenbrecher, Members of and Constituting the Board of Public Service Commissioners of The City of Los Angeles; The Council of The City of Los Angeles, and Martin F. Betkouski, James S. Conwell, Frederick C. Langdon, Estelle Lawton Lindsey, Robert T. Brain, William A. Roberts, Foster C. Wright, Fred C. Wheeler, and John Topham, as Members of and Constituting the Council of The City of Los Angeles; John L. Butler, Chief of Police of The City of Los Angeles, and Ezra F. Scattergood, Chief Electrical Engineer of the Bureau of Power and Light of The City of Los Angeles, Defendants.

8 In the District Court of the United States in and for the Southern District of California, Southern Division.

In Equity.

LOS ANGELES GAS and ELECTRIC CORPORATION, a Corporation, Complainant,

vs.

THE CITY OF LOS ANGELES, a Municipal Corporation; FREDERICK T. WOODMAN, as Mayor of The City of Los Angeles; Board of Public Works of The City of Los Angeles and Lorin A. Handley, Patrick P. O'Brien and Owen McAleer, Members of and Constituting the Board of Public Works of The City of Los Angeles; Department of Public Service of The City of Los Angeles and Reginald F. Del Valle, Louis H. Valentine, Meredith P. Snyder, John W. Kemp and Byron Erkenbrecher, Members of and Constituting the Board of Public Service Commissioners of The City of Los Angeles; the Council of The City of Los Angeles and Martin F. Betkouski, James S. Conwell, Frederick C. Langdon, Estelle Lawton Lindsey, Robert T. Brain, William A. Roberts, Foster C. Wright, Fred C. Wheeler and John Topham, as Members of and Constituting the Council of The City of Los Angeles; John L. Butler, Chief of Police of The City of Los Angeles, and Ezra F. Scattergood, Chief Electrical Engineer of the Bureau of Power and Light of The City of Los Angeles, Defendants.

Bill of Complaint for Injunction.

Comes now complainant, and for cause of action against defendants avers:

I.

That The City of Los Angeles, one of the defendants herein, is now, and at all times hereinafter mentioned was, a municipal corporation duly incorporated, organized and existing under and by virtue of a charter duly and regularly adopted, approved and established under and pursuant to Section 8 of Article XI of the Constitution of the State of California (to which said charter, and to the whole thereof, complainant begs leave to refer as fully as if incorporated herein), and situate in the County of Los Angeles, in the
9 Southern Division of the Southern District of said State of California.

II.

That defendant Frederick T. Woodman is now, and ever since the 5th day of September, 1916, has been, the duly appointed, qualified and acting Mayor of The City of Los Angeles, a municipal corpora-

tion. That said defendant Woodman is a citizen of the State of California and of the United States, and resides at No. 4123 Budlong Avenue in said The City of Los Angeles.

III.

That defendant Board of Public Works of The City of Los Angeles is a department of the municipal government of said The City of Los Angeles, having and exercising such administrative and ministerial duties as are conferred upon it by the charter of said The City of Los Angeles and the laws of the State of California.

IV.

That defendants Lorin A. Handley, Patrick P. O'Brien and Owen McAleer are members of and constitute the Board of Public Works of said The City of Los Angeles.

That defendant Lorin A. Handley is a citizen of the State of California and of the United States, and resides at No. 117 West Avenue 55 in said city, county and state.

That said defendant Patrick P. O'Brien is a citizen of the State of California and of the United States, and resides at No. 320 West 22nd Street in said city, county and state.

That said defendant Owen McAleer is a citizen of the State of California and of the United States, and resides at No. 3817 South Main Street in said city, county and state.

V.

That defendant Department of Public Service of said The City of Los Angeles is a department of the municipal government of said The City of Los Angeles, having and exercising such powers as are conferred upon it by the city charter of said The City of Los Angeles.

VI.

That Reginald F. Del Valle, Meredith P. Snyder, Louis H. Valentine, John W. Kemp and Byron Erkenbrecher are members of and constitute the Board of Public Service Commissioners of said The City of Los Angeles and the Department of Public Service thereof, and as such have control, direction and management, and are in charge of the operation of the municipal electrical distributing system of said The City of Los Angeles, which said city owns, or claims to own, and are in charge, control and management of a generating and distributing system of said municipality for the purpose of generating, distributing and selling to the inhabitants of the City of Los Angeles electrical energy for light, heat and power purposes, as hereinafter more fully appears.

That defendant Reginald F. Del Valle is a citizen of the State of

California and of the United States, and resides at No. 3508 Sout Figueroa Street in said city, county and state.

That defendant Meredith P. Snyder is a citizen of the State of Cal fornia and of the United States, and resides at No. 1230 Fifth Avenu in said city, county and state.

That defendant Louis H. Valentine is a citizen of the State o California and of the United States, and resides at No. 916 Sout Alvarado street in said city, county and state.

That defendant John W. Kemp is a citizen of the State of Cal fornia and of the United States, and resides at No. 2115 South Hobar Boulevard in said city, county and state.

That defendant Byron Erkenbrecher is a citizen of the State o California and of the United States, and resides at No. 623 Sout Berendo Street in said city, county and state.

11

VII.

That defendant the Council of The City of Los Angeles the govern ing and legislative body of said The City of Los Angeles, having an exercising such powers as are conferred upon it by said charter o said The City of Los Angeles and the laws of the State of California and defendants Martin F. Betkouski, James S. Conwell, Frederick C Langdon, Estelle Lawton Lindsay, Robert T. Brain, William A Roberts, Foster C. Wright, Fred C. Wheeler and John Topham ar now, and ever since the 5th day of July, 1915, have been, the duly elected, qualified and acting members of the Council of said The City of Los Angeles, and as such constitute and are the Council of said The City of Los Angeles.

That said defendant Martin F. Betkouski is a citizen of the State of California and of the United States, and resides at No. 1334 Palma Street in said city, county and state.

That defendant James S. Conwell is a citizen of the State of Cali fornia and of the United States, and resides at No. 871 Gramercy Drive in said city, county and state.

That defendant Frederick C. Langdon is a citizen of the State of California and of the United States, and resides at No. 941 South Alvarado Street in said city, county and state.

That defendant Estelle Lawton Lindsay is a citizen of the State of California and of the United States, and resides at No. 2416 Echo Park Drive in said city, county and state.

That defendant Robert T. Brain is a citizen of the State of Cali fornia and of the United States, and resides at No. 2938 South Hobart Boulevard in said city, county and state.

That defendant William A. Roberts is a citizen of the State of California and of the United States, and resides at No. 5327 Monte Vista Street in said city, county and state.

That defendant Foster C. Wright is a citizen of the State of Cali fornia and of the United States, and resides at No. 2631 West

12 Avenue 32 in said city, county and state.

That defendant Fred C. Wheeler is a citizen of the State

of California and of the United States, and resides at No. 1301 Waterloo Street in said city, county and state.

That defendant John Topham is a citizen of the State of California and of the United States, and resides at No. 1143 West 35th Street in said city, county and state.

VIII.

That defendant John L. Butler, at all times hereinafter mentioned subsequent to the 15th day of October, 1916, has been, and now is, the duly appointed, qualified and acting Chief of Police of said The City of Los Angeles, the municipal corporation aforesaid:

That said defendant John L. Butler is a citizen of the State of California and of the United States, and resides at No. 4115 Woodlawn Avenue in said city, county and state.

IX.

That defendant Ezra F. Scattergood is the Chief Electrical Engineer of the Bureau of Power and Light of the City of Los Angeles, which said bureau is a department of the said Department of Public Service of said The City of Los Angeles; that said defendant Scattergood is a citizen of the State of California and of the United States, and resides at No. 1415 Berkeshire Street in said city, county and state.

X.

That complainant, Los Angeles Gas and Electric Corporation, is now, and ever since the 22nd day of June, 1909, has been, a corporation organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City of Los Angeles, County of Los Angeles, State of California.

13 XI.

That complainant, ever since the 1st day of August, 1909, has been and is now, engaged in generating, furnishing, distributing and selling electric energy to consumers in said The City of Los Angeles and the inhabitants thereof; that long prior to the 10th day of October, 1911, said Los Angeles Gas and Electric Corporation and its predecessors in interest had, under and pursuant to the provisions of Section 19 of Article XI of the Constitution of the State of California, as such section existed prior to the amendment thereof on October 10th, 1911, lawfully erected, constructed and maintained, and ever since the date last mentioned has maintained and is now maintaining, poles, wires, conduits and other electrical apparatus, devices and appliances, in the streets, thoroughfares and public places of said City of Los Angeles, for the purpose of supplying and furnishing electrical energy to said city and the inhabitants thereof for illuminating light; that under and pursuant to said Constitution of the State of California said complainant now owns, possesses, en-

joys and uses the right, privilege and franchise of using and occupying the public streets, thoroughfares and places of the City of Los Angeles for the purpose of erecting, constructing and maintaining poles, wires, conduits and other electrical apparatus and appliances thereon or thereunder so far as may be necessary for introducing into and supplying the said City of Los Angeles and its inhabitants with electrical energy for illuminating light. That from time to time since the said 10th day of October, 1911, and before said date, complainant and its predecessors in interest have extended their, and complainant is now from time to time extending its, system of poles, wires, conduits and other electrical apparatus and appliances upon said public streets, places and thoroughfares of said City of Los Angeles, for the purpose of supplying said City of Los Angeles and its inhabitants with electrical energy for illuminating light, and complainant now serves and supplies electrical energy to approximately forty thousand consumers in said City of Los
14 Angeles, and the value of its property dedicated and engaged and used in said public service exceeds the sum of $7,500,000.

XII.

That in installing erecting and constructing said distributing system for the purpose of supplying said The City of Los Angeles and its inhabitants with electrical energy as aforesaid, under and by virtue of said constitutional franchise, complainant and its predecessors in interest have erected, constructed and maintained, and complainant is now erecting, constructing and maintaining, poles, wires, conduits, guy-posts, guy-wires, anchors, and other apparatus and appliances in and upon said public streets, places and thoroughfares for the purpose of carrying, conveying and distributing said electrical energy. That said poles, wires, conduits and other apparatus and appliances so erected, constructed and maintained by complainant or its predecessors in interest, were erected and are now being erected, constructed and maintained upon said public streets, places and thoroughfares in said city under the constitutional franchise hereinbefore mentioned and with all due and proper regard and consideration for the public health, safety and convenience. That in the placing of its poles and its wires as aforesaid, complainant and its predecessors in interest have, and had, selected those points and localities upon and along the public streets, places and thoroughfares in said municipality which at the same time were calculated to serve the best interests of the public and of complainant and its predecessors in interest. That said poles and wires so erected by complainant and its predecessors in interest, or by either of them, for the purposes aforesaid, are, and each of them is, a component and integral part of the distributing system of complainant, and not capable of separation from the balance of said distributing system of complainant without great expense and inconvenience and the possible and probable loss of consumers, and the interruption of service of complainant. That said poles and

15 wires were located and installed by complainant under the direction of defendant Board of Public Works; that said Board has, and had at all times herein mentioned, control and superintendence of the public streets, places and thoroughfares in The City of Los Angeles.

XIII.

That defendant The City of Los Angeles, a municipal corporation, and defendant Department of Public Service of The City of Los Angeles, and defendants Reginald F. Del Valle, Meredith P. Snyder, Louis H. Valentine, John W. Kemp and Byron Erkenbrecher, as members of and constituting the Board of Public Service Commissioners of said The City of Los Angeles, have been for not more than two years last past, and now are, engaged in the erection, construction and operation of a distributing system for the distribution and sale of electrical energy to be used for the purpose of lighting the streets and public places of the City of Los Angeles and the supplying to the inhabitants and others in said City of Los Angeles of light for domestic and commercial purposes at a profit.

XIV.

That complainant, under and by virtue of and pursuant to said constitutional franchise, and in or about the year 1913, commenced and prosecuted the construction of and constructed an extension and part of its distributing system upon and along York Boulevard, a public street located within the said City of Los Angeles, which said extension and part of said distributing system was designed for the purpose and with the intent of lighting the streets of said City of Los Angeles with electrical energy pursuant to a certain contract with said city, and of supplying light for domestic and commercial uses to the inhabitants of said city residing in or near the vicinity of York Boulevard; that said extensions consisted of poles and wires, conduits and other electrical apparatus and appliances strung
16 and suspended on said poles; and at all times since the year 1913 complainant has maintained and used, and does now maintain and use, said extensions and part of said distributing system for the purpose of conveying electrical energy upon and along said York Boulevard for the uses and purposes aforesaid.

XV.

That at the time of the construction and erection by complainant of said poles, wires, conduits and other appliances and apparatus on said York Boulevard, neither defendant The City of Los Angeles, nor any of the other said defendants herein, had constructed or installed any part of any distributing system for electrical energy, or any poles, wires or conduits, upon or along said York Boulevard; that no part of any electrical distributing system constructed, owned or used by said defendant The City of Los Angeles, or any depart-

ment thereof, was erected, constructed or used upon any of the streets, alleys, thoroughfares or other public places in said city prior to the year 1916.

XVI.

That subsequent to the year 1915, and during the year 1916, and not before, said defendants The City of Los Angeles, the Department of Public Service thereof, and Reginald F. Del Valle, Louis H. Valentine, Meredith P. Snyder, John W. Kemp and Byron Erkenbrecher, members of and constituting the Board of Public Service Commissioners of The City of Los Angeles, and Ezra F. Scattergood, Chief Electrical Engineer of the Bureau of Power and Light of the said City of Los Angeles, commenced the construction and erection of a part of an electrical distributing system upon and along York Boulevard, aforesaid, upon the same side of said Boulevard as is located the distributing system of complainant, and said defendant The City of Los Angeles, through its officers,
17 servants or agents, now maintains upon and along said York Boulevard, in the position aforesaid, poles set in the ground in close proximity and juxtaposition to the poles of complainant, from which said poles so set and located by said defendants are suspended and carried wires, conduits and other electrical apparatus carrying and transmitting, and designed to carry and transmit and now carrying and transmitting, large and dangerous quantities of electrical energy in close, dangerous and unlawful proximity to the said wires, poles, conduits and other electrical apparatus maintained by complainant as aforesaid. That said wires so carried and suspended upon said poles so erected by said defendants City of Los Angeles and the Department of Public Service thereof and the said Public Service Commissioners, were designed and constructed, and are used, operated and maintained, not only for the purpose of lighting the public streets of said City of Los Angeles, but were and are designed and constructed, and are used, operated and maintained, upon said poles, so located upon and along said York Boulevard, for the purpose of supplying electrical energy for light for domestic and commercial uses at a profit and for a remuneration to said City of Los Angeles.

XVII.

That said defendant City of Los Angeles, acting through its agents, servants, officers and attorneys, and all of the said defendants save and except John L. Butler, Chief of Police of The City of Los Angeles, openly state and avow its and their intention to extend and enlarge a municipal electric distributing system of said City of Los Angeles so that it will cover a vast portion of said municipality and secure as customers a large majority of the consumers of electrical energy therein, and to extend and enlarge said municipal electrical distributing system to those portions of the City of Los Angeles which are now served by complainant through its distributing system. And said City of Los Angeles, and said defendant

Department of Public Service, in the generation, distribution, supply and sale of electrical energy, is now, in many localities of said City of Los Angeles, in open and active competi- ith complainant in the generation and supply of said elec- energy for domestic and commercial uses. And said de- ts and each of them openly threaten and intend to be and in all localities in said municipality now supplied with al energy by complainant an open and active competitor of inant in its said business.

XVIII.

t on or about the 25th day of January, 1917, complainant commenced an action by filing a complaint, upon which ons was issued, in the Superior Court of the State of Cali- in and for the County of Los Angeles in said state, in which ction complainant herein was plaintiff and the City of Los s, Frederick T. Woodman as Mayor of the City of Los s, M. F. Betkouski, J. S. Conweil, F. C. Langdon, Estelle n Lindsey, Robert T. Brain, William A. Roberts, Foster C. t, Fred C. Wheeler and John Topham, members of and con- ng the City Council of the City of Los Angeles, the Depart- of Public Service of the City of Los Angeles, and R. F. Del M. P. Snyder, L. H. Valentine, J. W. Kemp and Byron hrecher as members of and constituting the Board of Public e Commissioners of said City of Los Angeles, the Department blic Service of the City of Los Angeles, and E. F. Scattergood, Electrical Engineer of the Bureau of Power and Light of ty of Los Angeles, were defendants. That in said action plain- mplained that the said defendants, and each of them, in the uction, erection, operation and maintenance of the municipal of the City of Los Angeles for the generation, distribution ppiy of electrical energy, were wilfully, knowingly and un- lly interfering with and trespassing upon plaintiff's wires, and other electrical apparatus, appliances and property, and rected, strung and constructed, and were erecting, stringing onstructing, wires and other apparatus and appliances of said municipal electrical distribution system in such close proxim- ity to the wires, poles and other appliances and property of plaintiff, theretofore lawfully constructed, erected and main- l and existing upon the public streets, places and thoroughfares e City of Los Angeles, as to be dangerous and hazardous to fe and limb of plaintiff's employes, dangerous to the property aintiff, and dangerous and unsafe and hazardous to the life, and property of the public in general, and that the wires said municipal electrical distribution system were constructed rected in such proximity to the poles, wires and other ap- es and apparatus of complainant as to be in violation of the of the State of California and the rules and regulations of the oad Commission thereof. That in said complaint plaintiff rth divers and numerous instances of such trespass, interference

and violations of law on the part of said defendants, their officers, agents, servants and employes, particularly upon said York Boulevard, and complainant prayed that said defendants, and each of them, their officers, agents, servants and employes, be enjoined and restrained from interfering with, moving or displacing the poles and wires of plaintiff, or the poles and wires owned and controlled jointly by plaintiff and other public service corporations, from stringing, erecting or maintaining wires or appliances of any kind or description on the poles belonging to plaintiff or to plaintiff jointly with other public service corporations; and that said defendants, their officers, agents, servants and employes, be enjoined and restrained from stringing or allowing to remain in close or unlawful proximity to the wires, poles and equipment of plaintiff any lines or wires highly charged with electrical energy, and that said city of Los Angeles and said defendants, their officers, agents, servants and employes, be enjoined and restrained from interfering with or displacing said poles or wires or other equipment belonging to plaintiff or owned by plaintiff jointly with other public service corporations, or from stringing, erecting constructing or maintaining wires or appliances of any kind or nature along or upon said poles belonging to plaintiff. That upon the filing of the complaint and the issuance of summons thereon, and on said 25th day of January, 1917, an order to show cause was issued out of the Superior Court, directed to said defendants, and each of them, requiring that the said and each of said defendants appear before said Superior Court in Department 16 thereof and show cause why they and each of them should not be enjoined and restrained, pendente lite, in conformity with the prayer in said complaint. That in due course defendants appeared before said Superior Court and department thereof, and failing to show cause why said injunction, pendente lite, should not be granted, said court issued an injunction pendente lite, directed to said defendants, and each of them, a copy of which said injunction, pendente lite, is hereunto annexed, marked Exhibit "A," and by this reference thereto made a part and parcel hereof. That thereafter said cause came duly and regularly on for trial before said Superior Court in Department No. 1 thereof, before the Hon. John M. York sitting as Judge thereof, and after due proceedings had in said trial, and based upon the evidence in said cause and the law in the premises, said court made and rendered its judgment and decision upon the merits of said action, which said judgment was duly and regularly entered upon the 28th day of March, 1917, in Book 408 of Judgments, at page 122, Records of H. J. Lelande, County Clerk of the County of Los Angeles and ex-Officio Clerk of the Superior Court of said County, a copy of which said judgment is hereunto annexed, marked Exhibit "B," and by this reference thereto made a part and parcel hereof. That no appeal has been taken from said judgment of said court, and at all times since the 28th day of March, 1917, and said judgment and decree has been and is now a valid and subsisting judgment and decree of said court. That pursuant to said judgment and decree, and in

COPY BOUND CLOSE

conformity therewith, a writ of injunction was issued out of said court by the clerk thereof and under the seal of said court,
21 directed to said defendants The Department of Public Service of the City of Los Angeles and R. F. Del Valle, M. P. Snyder, L. H. Valentine, J. W. Kemp and Byron Erkenbrecher as members of and constituting the Board of Public Service Commissioners of said City of Los Angeles, and E. F. Scattergood, Chief Electrical Engineer of the Bureau of Power and Light of said city of Los Angeles, which said writs of injunction were duly, regularly and personally served upon the said defendants and each of them; a copy of said last mentioned writ is hereunto annexed marked Exhibit "C," and by this reference thereto made a part and parcel hereof.

That subsequent to the granting of the injunction pendente lite hereinbefore mentioned in said cause, and during the trial thereof, in order to escape from the provisions of said injunction pendente lite and to escape from the anticipated result of the trial of said cause and the judgment and decree of said court to be entered therein, and in order to enable them and each of them to construct and erect those parts of the electrical distributing system of said City of Los Angeles contemplated or planned to be erected and constructed, without the expense and costs that would be incurred in erecting and constructing said system at a lawful and safe distance from the poles and wires of complainant in the streets, thoroughfares or public places of the City of Los Angeles, and in order that in the event said municipal electric distributing system and the poles, wires and appliances thereof were constructed or erected in dangerous or unlawful proximity or juxtaposition to the wires, poles and appliances of complainant, they and each of them might escape from and avoid the trouble, inconvenience, expense and costs of placing or locating said municipal poles and wires so as to comply with the laws of the State of California and the rules and regulations of the Railroad Commission thereof, and in order to escape, avoid and render ineffective the provisions of said injunction pendente lite and the contemplated or anticipated result in said action inimical to the designs and plans of said de-
22 fendants so far as the placing of the poles and wires of said municipal electrical distribution system violated the provisions of the laws of the State of California and the rules and regulations of the Railroad Commission thereof, and under the pretense of regulating the electric distributing systems of public service corporations using poles and wires in said City of Los Angeles, defendants Department of Public Service of the City of Los Angeles and Reginald F. Del Valle, Meredith P. Snyder, Louis H. Valentine, John W. Kemp and Byron Erkenbrecher as members of and constituting the Board of Public Service Commissioners of said The City of Los Angeles, and E. F. Scattergood, Chief Electrical Engineer of the Bureau of Power and Light of the City of Los Angeles, their agents, servants or attorneys, caused and procured defendants Martin F. Betkouski, James S. Conwell, Frederick C. Langdon, Estelle Lawton Lindsey, Robert T. Brain, William A.

IN CENTER

Roberts, Foster C. Wright, Fred C. Wheeler and John Topham members of and constituting the City Council of the City of Los Angeles, and Frederick T. Woodman as Mayor of said City of Los Angeles, to pass and adopt, on the 7th day of March, 1917, a purported ordinance numbered 36,125 (New Series) entitled:

"An ordinance providing for the removal or re-location of poles and other properties located in the public streets and other public places of the City of Los Angeles, when necessary, in order that the municipal electrical street lighting system may be constructed, operated and maintained therein,"

a copy of which said ordinance is hereunto annexed, marked Exhibit "D," and by this reference thereto made a part and parcel hereof.

23

XIX.

That said purported Ordinance No. 36,125 (New Series), hereinbefore referred to as Exhibit D, was passed and adopted by said defendants Frederick T. Woodman and said Council of The City of Los Angeles and said defendants as members of and constituting said Council of said The City of Los Angeles, not as a police measure or in the lawful exercise of the police powers of said municipality, but solely for the purpose and with the intent and design of securing to said city and said Department of Public Service the supplanting of the complainant in, and the ousting of complainant from, the advantageous positions and locations and places for poles and wires now occupied by complainant upon and along the public streets, places and thoroughfares in said city, and for the purpose and with the design and intent of depriving the complainant of the right to the use of said positions and locations now lawfully occupied by it, and of enabling said defendant The City of Los Angeles, its officers, agents, servants and employes, and defendant Board of Public Service Commissioners, aforesaid, and defendant Ezra F. Scattergood as Chief Electrical Engineer of the Bureau of Power and Light of The City of Los Angeles, to construct and erect and maintain a municipal electric distributing system at less cost and expense than would otherwise be incurred.

XX.

That with the design, purpose and intent of enabling said defendants to maintain in their present fixed, and as aforesaid unlawful and dangerous positions the wires, poles and other electrical equipment and apparatus of said municipal electrical distributing system upon and along said York Boulevard, and for the purpose and with the intent and design of securing for the said municipal distributing system of said city and of supplanting complain-

24 ant in, the positions heretofore and now occupied by the poles and wires of complainant and its predecessors in interest upon and along said York Boulevard, and for the purpose and with

he intent and design of escaping and avoiding said writs of in-
nction hereinbefore set forth, and for the purpose and with the
ntent and design of escaping and avoiding the increased cost and
xpense of reconstructing said municipal distributing system upon
nd along York Boulevard so as to comply with the provisions of
aid decree and writs of injunction and the laws of the State of
'alifornia and the rules and regulations of the Railroad Commis-
ion thereof, said defendants Department of Public Service of The
'ity of Los Angeles and the said defendants Reginald F. Del Valle,
ouis H. Valentine, Meredith P. Snyder, John W. Kemp and Byron
Erkenbrecher as members of and constituting the Board of Public
ervice Commissioners of said City, and said defendant Ezra F.
Scattergood, as Chief Electrical Engineer of said Bureau of Power
nd Light of the City of Los Angeles, caused and procured said
lefendants the Board of Public Works, and Lorin A. Handley,
'atrick P. O'Brien and Owen McAleer, as members of and constitut-
ng the Board of Public Works of the said City of Los Angeles, to
leliver to complainant, on the 24th day of March, 1917, a notice in
he words and figures as follows, to-wit:

"March 24, 1917.

os Angeles Gas & Electric Corporation, Los Angeles, Cal.

GENTLEMEN: At a meeting of the Board of Public Works of Los
ngeles, California, held March 24, 1917, you were directed to make
he following changes in the elevation of your wires, cross arms, etc.,
n York Boulevard, to-wit:

Armadale Avenue and York Boulevard, remove old pole top
ixture from top of your pole No. 18595-G and lower your wires
aking any position you may desire below 41 feet above curb
line.

5 York Boulevard and Avenue 49, remove old pole top fixture
from top of your pole No. 18596-G and lower your wires,
aking any position you may desire below 41 feet above curb line.

York Boulevard and Avenue 50, remove pole top fixture from
ole No. 18597-G. Lower wires on York Blvd. on Pole No. 18597-G
o 41 ft. 6 in. level. Lower wires on No. 18597-G running south on
Avenue 50 to any level between 41 ft. 6 in. and 39 ft. 6 inch. Place
our wires on pole No. 4263-M on present city arm at 41 ft. 4 in.
evel.

York Boulevard and Avenue 51, remove old pole top fixture from
our pole No. 18599-G, and lower your wires to any position below
0 feet above the curb line.

York Boulevard and Avenue 52, lower your wires on your pole
o. 18600-G to any position below 41 feet above curb line.

York Boulevard and Avenue 53; lower line arm on pole No.
8601-G to the 36 ft. 6 in. level using the 34 ft. 6 in. level for buck
rm for wires running north on Avenue 53.

This order is given pursuant to the provisions of Ordinance No.
6,125 New Series, which provides that the work of removal and re-

location shall be commenced within a period of 5 days from the receipt of this notice and prosecuted diligently to completion.

Yours very truly,

BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES,

By LORIN A. HANDLEY, *President*.

By HORACE B. FERRIS, *Secretary*."

XXI.

That, as hereinbefore in part set forth, the wires, conduits and other electrical apparatus of complainant's distributing system upon and along said York Boulevard are suspended from and held in place upon cross-arms and other devices affixed to poles
26 erected and constructed upon said York Boulevard, which said poles complainant either owns in fee or owns jointly in conjunction with other public service corporations having franchises to occupy the public streets, places and thoroughfares of said municipality with poles and wires for the transmission of electrical energy. That of the poles upon and along said York Boulevard which are used by complainant and jointly owned by complainant and such other public service corporations, complainant is entitled to occupy and use and occupies and uses upon said poles a certain space for the support of its wires, apparatus and appliances, which said space is defined, granted and reserved to complainant under and by *virtue* of a contract or agreement called "The Joint Pole Contract," executed by and between complainant and such other public service corporations on or about the 10th day of October, 1906, and a supplemental contract thereto dated the 5th day of October, 1907. A copy of each of said contracts is hereunto annexed marked respectively as Exhibits "E" and "F" and by this reference made a part hereof. That upon one of the locations in which removals and changes are specified and required to be done and performed in said notice hereinbefore set forth under date of March 24th, 1917, directed to complainant from said the Board of Public Works of the City of Los Angeles, to-wit, upon pole No. 18597-G specified therein, complainant is unable to occupy any other position on said pole than that which it now occupies, by reason of the fact that all other positions that can be lawfully occupied upon said pole are now granted and reserved to other parties to said joint pole contract; and complainant, if required to move from its location thereon as directed in said notice, would have no place upon said pole at which it could lawfully attach and maintain its wires; and in one case, to-wit, that of pole No. 4263-M, complainant is directed by said notice to place its aforesaid wires upon a pole and cross-arm erected and maintained by said
27 defendants and constituting a part of said municipal electric distributing system; that in all cases in which removals and changes of wires are directed or ordered to be made by said notice, complainant, if required to make such removals and changes as

directed, will be required to remove its wires from a higher to a lower position and from a more advantageous position to a less advantageous position on said poles; and that in all cases in which removals and changes are specified and required to be done and performed in said notice complainant, if required to make said removals and changes directed, would be deprived of its right to the use and occupation of the positions and locations now lawfully occupied by its wires and other apparatus on said street.

XXII.

That said ordinance hereinbefore mentioned as Exhibit "D" is invalid, illegal and of no force or effect, in this: That said ordinance delegates or attempts to delegate legislative or discretionary powers to said Board of Public Works of the City of Los Angeles, an administrative and ministerial department of said municipal government having powers as aforesaid; that said ordinance delegates or attempts to delegate to said Board of Public Works functions, authority and discretion which can lawfully be exercised only by the Council of said City of Los Angeles and the members thereof as the legislative body and authority of said municipality.

XXIII.

That neither said ordinance herein set forth as Exhibit "D," nor said notice herein set out in paragraph XX of this bill, is reasonable or just, but on the contrary the same are and each of them is unjust, unreasonable, arbitrary, confiscatory and contrary to and in violation of Section 1 of Article V of the Constitution of the United States, in that the property and rights of complainant are taken by defendants thereby without just compensation, and complainant is thereby deprived of its property and rights without due
28 process of law.

That said ordinance and notice, and each of them, is illegal and void, for the reason that they are and each of them is contrary to and in violation of Section 14 of Article I of the Constitution of the State of California, in that the private rights and property of complainant are taken by defendants without just compensation having first been made to or paid into court for complainant.

That said ordinance and notice are, and each of them is, invalid, illegal, and of no lawful force or effect, for the reason that the same are, and each of them is, an unlawful, arbitrary and confiscatory attempted exercise of the police power lawfully vested in said municipality, for the illegal design, purpose and intent of securing to said City of Los Angeles, acting in a proprietary capacity and exercising a proprietary function, the rights, property and franchises of complainant without compensation to complainant and without the exercise of the power of eminent domain vested in said municipality.

That said ordinance and said notice hereinbefore mentioned are, and each of them is, null, void, illegal, unlawful, contrary to and in violation of Section 1 of Article IV of the Constitution of the United

States, in that complainant is thereby deprived of its property wi
out due process of law and is denied the equal protection of the la

XXIV.

That in giving the directions contained in the notice set forth
paragraph XX hereof defendants have assumed to act under a
pursuant to said invalid and illegal ordinance herein referred to
Exhibit "D" under pretense of exercising the police power of T
City of Los Angeles, but in fact in giving and threatening to enfo
said directions and said ordinance defendants are endeav
29 ing unlawfully and unconstitutionally to secure and obta
for said City of Los Angeles and said municipal electric d
tributing system the valuable rights, property and franchises of co
plainant, and are seeking to deprive complainant of the same witho
due process of law.

That defendants threaten and intend, and unless restrained a
enjoined by the order of this Court, will, under the assumed and p
tended authority of said purported ordinance, herein referred to
Exhibit "D," in each or every case or instance where the poles, wir
apparatus or appliances of complainant erected and maintained
it as aforesaid upon the public streets, thoroughfares and places
said The City of Los Angeles, and used by complainant for the d
tr'bution and supply of electrical energy for light, are situate in a
advantageous, convenient or economical situation or location, whi
is envied, coveted or desired by defendants for the purpose of mo
conveniently or economically establishing or maintaining an electric
distributing system for the distribution by the City of Los Angel
and the Board of Public Service Commissioners of electrical energ
to private consumers, and more advantageously and effectively co
peting with complainant by ousting complainant from and su
planting complainant in the locations upon said streets, places an
thoroughfares that are most valuable, advantageous and necessary
complainant for the carrying on of its said business, to order an
direct said complainant under the assumed authority of said pu
ported ordinance to remove from said locations such poles, wire
apparatus or appliances so erected and maintained by complainan
and in the event of a failure or refusal by complainant to compl
with such order and direction so given the defendants threaten an
intend, and unless restrained and enjoined by the order of this Cou
will themselves remove from their locations such poles, wires an
apparatus of complainant by force. That complainant wi
30 thereby suffer immediate and irreparable loss, damage an
injury.

That before and since the passage of said purported ordinanc
herein set forth as Exhibit "D," and since the commencement of th
construction of said distributing system of The City of Los Angele
the said The City of Los Angeles and said defendants Department o
Public Service of The City of Los Angeles, and defendants the Boar
of Public Service Commissioners and defendant Ezra F. Scattergood
and each of them, their agents, servants, attorneys and employees

have adopted a threatening, arbitrary and overbearing attitude and course of conduct toward complainant and its property and franchises, interfering with, trespassing upon and using complainant's property, rights of way and franchises, without permission and whenever and at such times it was convenient or economical for said defendants so to do.

XXV.

That said defendants intend and threaten in the event that the provisions of aforesaid purported ordinance and aforesaid notice are not complied with by complainant, and will unless restrained and enjoined by the order of this Court cause proceedings to be brought in the Courts against complainant for the enforcement of the penal clauses of said purported ordinance, and that complainant will be thereby immediately and irreparably damaged and be subjected to and harassed by a multiplicity of actions and judicial proceedings.

XXVI.

That complainant has no plain, speedy or adequate remedy at law.

XXVII.

That *is* is provided in and by the Fourteenth Amendment of the Constitution of the United States that no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens or any citizen of the United States, nor shall any state
31 deprive any citizen of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws; and complainant avers that this action is a case in equity arising under the Constitution of the United States and within the jurisdiction of this Honorable Court, as complainant is informed and believes, that the issues herein involve Federal questions under the Constitution of the United States, that the poles, wires, apparatus and appliances maintained by the complainant upon and along said York Boulevard for the uses and purposes aforesaid are of the value of more than three thousand dollars; that the rights and franchises of complainant to construct, erect and maintain said poles, wires, apparatus and appliances upon and along said York Boulevard are of the value of more than ten thousand dollars; that the constitutional franchise of complainant as aforesaid to occupy and use the public streets, places and thoroughfares of the City of Los Angeles, and the rights enjoyed and used by complainant thereunder, are of a value exceeding the sum of one million five hundred thousand dollars; that by reason of the matters hereinbefore set forth the aforesaid purported ordinance is unreasonable, unjust, arbitrary and confiscatory, and, if enforced will compel the complainant to conduct its business and operations under the arbitrary direction and behest of the defendants and will deprive complainant of its rights, privileges and franchises and property without due process of law;

that said purported ordinance and said directions given and intended to be given thereunder as aforesaid are violative of and prohibited by said provisions of said fourteenth amendment of the Constitution of the United States above referred to, and by reason of the provisions of said Fourteenth Amendment are null and void, and that by the enforcement of said purported ordinance the privileges and
32 immunities of complainant would be abridged and the equal protection of the laws denied to it; and complainant further avers that the matter in controversy in this action exceeds in value and amount, exclusive of interest and costs, the sum of three thousand dollars.

Wherefore, complainant prays a decree of this Honorable Court ordering, adjudging and decreeing that said purported ordinance of said City of Los Angeles numbered 36,125 (New Series), as herein set forth, be declared illegal, invalid, null, void and of no force or effect; that the said notice from said defendant the Board of Public Works of The City of Los Angeles and said defendants the members thereof, be declared, adjudged and decreed null, void and of no force or effect, and inoperative for any purpose whatsoever;

That said defendants The City of Los Angeles, a municipal corporation; Frederick T. Woodman, as Mayor of The City of Los Angeles; Board of Public Works of The City of Los Angeles, and Lorin A. Handley, Patrick P. O'Brien and Owen McAleer, members of and constituting the Board of Public Works of The City of Los Angeles, and Reginald F. Del Valle, Louis H. Valentine, Meredith P. Snyder, John W. Kemp and Byron Erkenbrecher, members of and constituting the Board of Public Service Commissioners of The City of Los Angeles; Department of Public Service of The City of Los Angeles; the Council of The City of Los Angeles, and Martin F. Betkouski, James S. Conwell, Frederick C. Langdon, Estelle Lawton Lindsey, Robert T. Brain, William A. Roberts, Foster C. Wright, Fred C. Wheeler and John Topham, as members of and constituting the Council of the City of Los Angeles, John L. Butler, Chief of Police of The City of Los Angeles, and Ezra F. Scattergood, Chief Electrical Engineer of the Bureau of Power and Light of The City of Los Angeles, and each of them, their officers, agents, serv-
33 ants, attorneys and employees, be perpetually enjoined and restrained by the order of this Court from in any wise or in any manner enforcing, acting under or carrying or attempting to carry into effect any of the provisions of said purported Ordinance No. 36,125 (New Series) or any part thereof.

That an order issue from this Court, under the seal thereof, directing defendants, and each of them, and ordering them, and each of them, to show cause, at such time and place as this Court may direct, why an injunction, pendente lite, should not be granted enjoining them, and each of them, their officers, agents, servants, attorneys and employees, from in any wise or in any manner enforcing, acting under or carrying or attempting to carry into effect any of the provisions of said purported Ordinance No. 36,125 (New Series) or any part thereof.

That pending the return day of said order to show cause, a preliminary restraining order be issued by this Court directed to said defendants, and each of them, enjoining and restraining them, and each of them, pending the hearing and determination of said order to show cause, from in any wise or in any manner enforcing, acting under or carrying or attempting to carry into effect any of the provisions of said purported Ordinance No. 36,125 (New Series) or any part thereof.

To the end that complainant may obtain the relief prayed for herein, it further prays the Court to grant the process of this Court by subpœna directed to said defendants and each of them, commanding them and each of them on a certain date and under a certain penalty, to be therein specified, to appear and answer (but not under oath, the answer of said defendants and each of them under oath being hereby waived) all of the allegations of the bill of complaint filed herein.

And complainant prays for such other further relief as may seem meet and equitable to this Honorable Court in the premises.

34

H. C. BEACH,
PAUL OVERTON,
HERBERT J. GOUDGE,
Solicitors for Complainant.

UNITED STATES OF AMERICA,
State of California,
County of Los Angeles, ss:

T. P. McCrea, being first duly sworn, on his oath, according to law, deposes and says: That he is an officer, to-wit, the Secretary, of the Los Angeles Gas and Electric Corporation, the complainant above named; that he makes this verification for and on behalf of said complainant; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to matters which are therein stated on information and belief, *as* as to those matters he believes it to be true.

T. P. McCREA.

Subscribed and sworn to before me this 29th day of March, 1917.

[SEAL.]

WILLIAM B. BEIRNE,
Notary Public in and for the County of Los Angeles, State of California.

35

EXHIBIT "A."

In the Superior Court of the State of California in and for the County of Los Angeles.

LOS ANGELES GAS AND ELECTRIC CORPORATION, a Corporation, Plaintiff,

vs.

CITY OF LOS ANGELES, a Municipal Corporation; FREDERICK T. WOODMAN, Mayor of the City of Los Angeles; M. F. Betkouski, J. S. Conwell, F. G. Langdon, Estelle Lawton Lindsey, Robert T. Brain, W. A. Roberts, Foster C. Wright, Fred C. Wheeler, and John Topham, Members of and Constituting the City Council of the City of Los Angeles; Department of Public Service of the City of Los Angeles; R. F. Del Valle, M. P. Snyder, L. B. Valentine, J. W. Kemp, and Byron Erkenbrecher, Members of and Constituting the Board of Public Service Commissioners of the City of Los Angeles, and E. F. Scattergood, Chief Electrical Engineer of the Bureau of Power and Light of the City of Los Angeles, Defendants.

Writ of Temporary Injunction.

Upon reading of the order to show cause made returnable before me in the above entitled action on the 31st day of January, 1917, and thereafter duly continued from time to time, and coming on regularly before me to be heard this 15th day of February, 1917; and the plaintiff appearing and being represented by its counsel, H. C. Beach, Esq., and the defendants, and each of them, appearing and being represented by their counsel, W. B. Mathews, Esq., William B. Himrod, Esq., and Lewis C. Whitehead, Esq., the Court having read and considered the verified complaint of the plaintiff on file herein and the affidavits filed by plaintiff and defendants, and the Court being fully advised in the premises, and no sufficient cause to the contrary being shown,

It is Ordered, Adjudged and Decreed that on said plaintiff causing to be executed and filed herein a written undertaking, pursuant to statute and the practise of this Court, to the effect that it will pay the said defendants such damages, not exceeding the sum
36 of Two Thousand Dollars ($2,000.00) as they may sustain by reason of the temporary injunction if the Court shall finally determine the plaintiff is not entitled thereto. That the said defendants, and each of them, their officers, agents, servants and employees, are hereby enjoined and restrained during the pendency of the above entitled action from interfering with, moving or displacing the poles and wires of plaintiff, or poles or wires owned or controlled jointly by plaintiff and other public service corporations; from stringing, erecting, constructing or maintaining wires, appliances or structures of any kind or description on poles

belonging to plaintiff, or upon poles owned or controlled by plaintiff jointly with other public service corporations; from stringing, placing, constructing in close, unlawful or unsafe proximity to the wires, poles or equipment of plaintiff 33,000 volt transmission lines, or other lines or wires highly charged with electrical energy; and from in any other manner trespassing on or interfering with the property of plaintiff until the further order of the Court. This order does not relate to or effect acts already done by defendants but has relation only to future acts threatened to be done by them.

Done in open Court this 15th day of February, 1917.

GRANT JACKSON,
Judge of the Superior Court.

37 EXHIBIT "B."

In the Superior Court of the State of California in and for the County of Los Angeles.

No. B-46946.

LOS ANGELES GAS AND ELECTRIC CORPORATION, a Corporation, Plaintiff,

vs.

CITY OF LOS ANGELES, a Municipal Corporation, et al., Defendants.

Judgment.

The above entitled matter having come regularly on to be heard before the above entitled Court on the 26th day of February, 1917, and the Honorable John M. York, sitting as Judge in Department One thereof; plaintiff appearing and being represented by its counsel, Messrs. Paul Overton, William A. Cheney and H. C. Beach, and the Defendants, and each of them, appearing and being represented by their counsel, Messrs. Albert L. Stephens, City Attorney, W. B. Mathews, Wm. B. Hinrod, and Lewis E. Whitehead, and evidence both oral and documentary having been offered and introduced for and on behalf of plaintiff and defendants, and the evidence being closed and the cause being submitted to the Court for decision; findings of fact having been waived by both plaintiff and defendants in open court, and the Court having considered the evidence offered for and on behalf of all parties hereto, and being fully advised in the premises;

It is now, therefore, Ordered, Adjudged and Decreed, that defendants Department of Public Service of the City of Los Angeles, and R. F. Del Valle, M. P. Snyder, L. H. Valentine, J. W. Kemp and Byron Erkenbrecher, members of and constituting the Board of Public Service Commissioners of the City of Los Angeles, and E. F. Scattergood, Chief Electrical Engineer of the Bureau
38 of Power and Light of the City of Los Angeles, and each of them, their agents, servants, attorneys and employees,

and each and all of them, be, and they are hereby, enjoined and restrained from in any manner trespassing upon, interfering with, moving or displacing the poles or wires, or either or any of them, owned or controlled wholly or in part by plaintiff; or erecting or placing any pole, cross-arm or other electrical appliance or equipment or attaching any wire or cable to or upon any pole, cross-arm or other electrical appliance or equipment in a fixed position within the distance from any pole, cross-arm, wire or other electrical appliance or equipment owned or controlled wholly or in part by plaintiff, as prescribed by the laws of the State of California and the rules and regulations of the Railroad Commission of said State; and on that certain public street in said City of Los Angeles known and denominated as York Boulevard said defendants, and each of them, their agents, servants and employees, be and they are hereby enjoined and restrained from conveying, running or transmitting electric power or energy through the lines and wires heretofore erected and constructed by said City of Los Angeles, its agents, servants or employees, on said York Boulevard until such time as said lines of wire belonging to said City of Los Angeles for the transmission of electrical energy along said York Boulevard are removed from the wires, poles and equipment of Los Angeles Gas and Electric Corporation to such distance as is prescribed by the laws of the State of California and the rules and regulations of the Railroad Commission thereof.

Nothing herein contained shall be construed as prohibiting or restraining the City of Los Angeles or its proper boards, officers or agents from carrying into effect any ordinance of said City providing for the removal or relocation of poles, anchors, cross arms, wires, street lamps or other fixtures, appliances or structures owned or controlled by said plaintiff and located in, upon, over
39 or under any public street *of* other public place of said city.

It is further Ordered, Adjudged and Decreed that the Clerk of the above entitled Court be and he is hereby authorized and directed to issue a writ of injunction in conformity with the judgment herein, under the seal of this Court, directed to the above named defendants and each of them.

It is further Ordered, Adjudged and Decreed that the plaintiff do have and recover of and from the defendants its costs incurred herein, which costs are hereby taxed at the sum of $—.

Done in open Court this 21st day of March, 1917.

JOHN M. YORK,
Judge of the Superior Court.

EXHIBIT "C."

e Superior Court of the State of California in and for the County of Los Angeles.

No. B-46946.

ANGELES GAS AND ELECTRIC CORPORATION, a Corporation, Plaintiff,

vs.

OF LOS ANGELES, a Municipal Corporation, et al., Defendants.

Writ of Injunction.

E OF CALIFORNIA,
County of Los Angeles, ss:

People of the State of California to the Department of Public rvice of the City of Los Angeles, and R. F. Del Valle, M. P. yder, L. H. Valentine, J. W. Kemp, and Byron Erkenbrecher, mbers of and constituting the Board of Public Service Commissioners of the City of Los Angeles, and E. F. Scattergood, ief Electrical Engineer of the Bureau of Power and Light of City of Los Angeles, Greetings:

hereas a judgment in the above entitled cause has been ren- by the above entitled Court enjoining and restraining you, ach of you, your agents, servants, attorneys and employees, in any manner trespassing upon, interfering with, moving or cing the poles or wires, or either or any of them, owned ntrolled wholly or in part by plaintiff; or erecting or placing ole, cross-arm or other electrical appliance or equipment or ing any wire or cable to or upon any pole, cross-arm or other ical appliance or equipment in a fixed position within the ce from any pole, cross-arm, wire or other electrical appliance or equipment owned or controlled wholly or in part by plaintiff, as prescribed by the laws of the State of California and the rules and regulations of the Railroad Commission of State; and on that certain public street in said City of Los les known and denominated as York Boulevard said defend- and each of them, their agents, servants and employees, be, hey are hereby, enjoined and restrained from conveying, run- or transmitting electric power or energy through the lines vires heretofore erected and constructed by said City of Los les, its agents, servants or employees, on said York Boulevard such time as said lines of wire belonging to said City of Los les for the transmission of electrical energy along *sa* said York vard are removed from the wires, poles and equipment of Los es Gas and Electric Corporation to such distance as is pre-

scribed by the laws of the State of California and the rules and regulations of the Railroad Commission thereof;

Now, therefore, you the said Department of Public Service of the City of Los Angeles and R. F. Del Valle, M. R. Snyder, L. H. Valentine, J. W. Kemp and Byron Erkenbrecher, members of and constituting the Board of Public Service Commissioners of the City of Los Angeles, and E. F. Scattergood, Chief Electrical Engineer of the Bureau of Power and Light of the City of Los Angeles, and each of you, your agents, servants, attorneys and employees, and each and all of them, are hereby commanded and strictly enjoined and restrained from in any manner trespassing upon, interfering with, moving or displacing the poles or wires, or either or any of them, owned or controlled wholly or in part by plaintiff; or erecting or placing any pole, cross-arm or other electrical appliance or equipment or attaching any wire or cable to or upon any pole, cross-arm or other electrical appliance or equipment in a fixed position within the distance from any pole, cross-arm, wire or other electrical appliance or equipment owned or controlled wholly or in part by
42 plaintiff, as prescribed by the laws of the State of California and the rules and regulations of the Railroad Commission of said State; and on that certain public street in said City of Los Angeles known and denominated as York Boulevard you the said defendants, and each of you, your agents, servants and employees, are hereby strictly enjoined and restrained from conveying, running or transmitting electric power or energy through the lines and wires heretofore erected and constructed by the City of Los Angeles, its agents, servants or employees, on said York Boulevard until such time as said lines of wire belonging to said City of Los Angeles for the transmission of electrical energy along said York Boulevard are removed from the wires, poles and equipment of Los Angeles Gas and Electric Corporation to such distance as is prescribed by the laws of the State of California and the rules and regulations of the Railroad Commission thereof.

Nothing herein contained shall be construed as prohibiting or restraining the City of Los Angeles or its proper boards, officers or agents from carrying into effect any ordinance of said City providing for the removal or relocation of poles, anchors, cross arms, wires, street lamps or other fixtures, appliances or structures owned or controlled by said plaintiff and located in, upon, over or under any public street or other public place of said City.

Given under my hand and seal this 21st day of March, 1917.

[SEAL.] H. J. LELANDE, *County Clerk.*

By E. A. WICKERHAM, *Deputy.*

Exhibit "D."

Ordinance No. 36125.

(New Series.)

n Ordinance providing for the removal or relocation of poles and other properties located in public streets and other public places of the City of Los Angeles, when necessary in order that the municipal electrical street lighting system may be constructed, operated and maintained therein.

Whereas, the public peace, health and safety demand the construction and establishment by The City of Los Angeles of an electrical stem, whereby the public streets and other public places of said ty may be lighted, and, to that end, it is necessary that pole and ire lines, street lamps and fixtures, and other incidental appliances, ould be installed in the public streets and public places of said city speedily as may be practicable; and,

Whereas, various persons, firms and corporations are maintaining the public streets and other public places of said city, poles, nchors, cross arms, wires, street lamps and other fixtures, appliices and structures, and it is necessary, in order that sufficient space ay be secured for said municipal electrical system in said public reets and public places, and that the work of constructing and estabshing the same may be carried on, to provide for the removal or location of certain of said poles and other properties so maintained said persons and corporations therefore:

The Mayor and Council of The City of Los Angeles do ordain as llows,

Section 1. That whenever it shall appear to the Board of Public Works of said city *of* the removal or relocation of any pole, anchor, ross arm, wire, street lamp, or any other fixtures, appliance or structure, owned or controlled by any person, firm or corporation, and located in, upon, over or under any public street or public place of said city, is necessary in order that the Municipal lectrical Street Lighting System of said city, or any part thereof, nay be erected, operated or maintained in such public street or public lace, then said Board shall give notice in writing to the person, firm r corporation owning or controlling said pole or other property, ocated as aforesaid, to remove or relocate the same; that such notice hall state the number and location of the poles, anchors, cross arms, ires, street lamps, or other fixtures, appliances or structures, to be emoved or relocated, and, when relocation of any such poles, anchors, ross arms, wires, street lamps, or other fixtures, appliances or structures, is required in such notice, then such notice shall designate the ocation in, upon, over or under any such public street or other ublic place to which the same shall be removed; and it shall be the luty of such person, firm or corporation to begin, within five (5)

days after the giving of such notice, the work of removing or relocating the poles, anchors, cross arms, wires, street lamps, or other fixtures, appliances or structures designated in such notice, and to prosecute such work diligently to completion.

Sec. 2. It shall be unlawful for any person, firm or corporation owning or controlling any pole, anchor, cross arm, wire, street lamp, or any other fixtures, appliance or structure located in, upon, over or under any public street or other public place in the City of Los Angeles, to fail or refuse to begin the work of removing or relocating such pole, anchor, cross arm, wire, street lamp, fixture, appliance or structure within five (5) days after receiving notice in writing from the Board of Public Works of said city so to do, as provided in Section 2 of this ordinance.

Sec. 3. It shall be unlawful for any person, firm or corporation owning or controlling any pole, anchor, cross arm, wire, street lamp, or any other fixture, appliance or structure located in, upon,
45 over or under any public street or other public place in the City of Los Angeles, to neglect or refuse, after five (5) days' notice in writing from the Board of Public Works of said City to said person, firm or corporation, as provided in Section 2 of this ordinance, to remove or relocate any such pole, anchor, cross arm, wire, street lamp, fixture, appliance or structure to diligently prosecute such removing or relocating to completion.

Sec. 4. That any person, firm or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punishable by a fine of not more than Five Hundred Dollars ($500) or by imprisonment in the City Jail for a period of not more than six (6) months, or by both such fine and imprisonment.

Each such person, firm or corporation shall be deemed guilty of a separate offense for every day during any portion of which any violation of any provision of this ordinance is committed, continued or permitted by such person, firm or corporation, and shall be punishable therefor as provided by this ordinance.

Sec. 5. That said Board of Public Works, or the board, commission or officer of said city having in charge the construction and establishment of said municipal electrical system, shall have power to move or relocate any pole, anchor, cross arm, wire, street lamp, or any other fixture, appliance or structure, owned and controlled by any person, firm or corporation in a public street or public place in said city, where such person, firm or corporation shall fail, within five (5) days after receipt of notice, as aforesaid, to begin the work of removing or relocating the same, or shall fail to diligently prosecute such work to completion.

Sec. 6. That said city is now engaged in the construction of an electrical system for lighting the public streets and other public places of said city; that said city has heretofore been compelled to depend on contracts with private utility corporations for furnishing
46 lighting for such public streets and public places and some of said contracts have already expired and all of said contracts

ill have expired by July 1, 1917, and the completion of said municipal system is necessary in order that said city may be able to rovide for lighting its public streets and other public places without nterruption; that the removal and relocation of certain poles, nchors, cross arms, wires, street lamps and other fixtures, appliances nd structures, owned or controlled by various persons, firms or corporation and located in said public streets and other public places of aid city, are immediately necessary in order that the city may complete and install its said electrical system; therefore, this ordinance is rgently required for the immediate preservation of the public peace, ealth and safety; and the City Clerk shall certify to its passage by unanimous vote, and cause the same to be published once in The os Angeles Daily Journal and thereupon and thereafter it shall take ffect and be in force.

I hereby certify that the foregoing ordinance was passed by the ouncil of the City of Los Angeles by the unanimous vote of all the embers of said Council present, there being not less than seven embers present, at its meeting of March 6th, 1917.

CHAS. L. WILDE,
City Clerk.

Approved this 7th day of March, 1917.

F. T. WOODMAN, *Mayor.*

47 EXHIBIT "E."

This agreement, made and entered into by and between the Pacific Electric Railway Company, a corporation, the Los Angeles Inter-Urban Railway Company, a corporation, the Pacific Light & Power Company, a corporation, the Los Angeles Railway Company, a corporation, the Edison Electric Company, a corporation, the Los Angeles Gas & Electric Company, a corporation and the Los Angeles Pacific Railway Company, a corporation, all doing business in the City of Los Angeles, County of Los Angeles and State of California, parties to this contract, Witnesseth:

That for and in consideration of the mutual benefits to be derived from the covenants and agreements here entered into, and the sums paid by one to another, the several parties hereto, do agree as follows:

General Purpose.

1st. That the present condition of the streets with reference to the poles installed therein shall be improved by reducing the number of poles to the minimum possible number of poles suitable for the safe carrying of wires in such a way as to be of the greatest possible benefit to the citizens of Los Angeles, as well as to the parties hereto, and to begin the construction of the lines at as early a date as possible, and to carry out the work with the greatest possible speed in such a way as to remove the superfluous poles and render the streets now somewhat crowded with poles generally acceptable to the public.

Pole Lines.

2nd. That in general all lighting and power wires will be carried on one side of each street, leaving the other side for the use of the telephone and telegraph companies for their wires. The poles on the one side occupied by the parties hereto being used for all of their wires as well as for the supporting of the span wires of the railway companies.

Railway Overhead Supports.

48 3rd. That the poles so set for the purpose of carrying the wires of the parties hereto, will also be arranged generally opposite those on the other side of the streets and at such distances between poles as will render it feasible for the railroad companies to use these poles for the support of their overhead conducting systems in connection with telephone poles of other companies.

Poles.

4th. That the poles shall be of uniform design, having all parts painted in the same general colors.

Expenses.

5th. That the parties will stand the expense of these poles generally as provided for in the specifications below referring to this matter.

Rights.

6th. That no party shall, by reason of its entering into this agreement, and allowing its own poles to be taken out, forfeit any of its rights to set poles or own poles and that no party hereto shall by any manipulation or transformation of this agreement, be caused to forfeit its rights now existing or to be obtained, to set poles under franchises owned by it.

Progress.

7th. That the parties will from time to time determine, by the action of the General Managers, or other duly authorized officials, to construct new pole lines, or to reconstruct the poles on certain streets, or portions of streets, using the highest and most satisfactory poles existing on the streets, or set entirely new poles, and when the parties have thus determined to do such work, those interested in the new construction or reconstruction shall notify the Managers of all parties to this agreement, advising them of the intended construction, and giving them the opportunity to join in the
49 same, if they so desire, and thereupon the parties entering into the combination shall authorize the work to be done in accordance with this agreement.

Committee.

8th. All matters concerning the combination use of the poles, which the Managers have agreed shall be made combination poles as above, shall, as to the manner of occupying and space to be occupied by the various parties be determined and agreed upon in advance of placing or occupying said poles and as a part of the agreement to enter into the particular combination; all matters arising thereafter which are not provided for in advance shall be referred to a committee and that portion of the committee composed of those members thereof representing the parties occupying those poles concerning which matters necessitating arrangements have arisen, shall decide all such matters.

Formation.

9th. That each party hereto shall appoint one member of this Committee, and these members shall, by a majority vote appoint a neutral member to be known as the secretary of the Committee. It shall be the duty of this secretary to post himself on all matters concerning line work about the City, and bring to the attention of the various members those points where reconstruction or rearrangement of the poles is most necessary, and he shall go over the ground with such members of the Committee and show them what should be done, and these members will then take up the matters with their proper officials for consideration, and if satisfactory, the officials will arrange for the reconstruction of the poles, as stated in section 7 above. Any member of the Committee who cannot be present at a meeting, may send another party to represent him at the meeting by merely giving him a signed letter, stating that he has authority to vote in his place, and this letter shall be filed with the secretary as his authority for accepting the vote of the party bearing the same. This party, in every case, however, to be properly identified. The secretary shall maintain an office in the City of Los Angeles, but shall have no vote at any time. The secretary shall be a man well posted in line construction matters, and shall have no other occupation.

Meetings.

10th. That there shall be a regular meeting of the Committee held at 9 a. m. on the first Tuesday of each month, and that special meetings may be called on three days' notice at any time throughout the month. It shall be the duty of the secretary of this Committee to notify each member of the Committee in writing and in person three days before each meeting, whether regular or special. The personal notification may be made by telephone. The secretary shall preside over these meetings, and bring before the Committee all matters concerning pole lines which have occurred since the last meeting. He shall also mail to each member of the Committee,

three days before each meeting, a statement of the business whi
is to come up at the following meeting, and in this statement sh
in every case be included the routes of all new proposed pole lir
or combination pole lines to be built, or entered into by any par
hereto, so that each party will be posted and send its representati
to the meeting in the event that it desires space on the poles to
constructed or rearranged.

Responsibility.

11th. That any party whose representative shall not be prese
at a meeting shall be ruled by the actions of the Committee exact
the same as though its representatives had been present.

Powers.

12th. That each member of this Committee shall have a vo
equal to that of every other member, no matter how many poles t
party whom he represents may own in the city, and each vote sha
be considered of the same weight and importance.

13th. That in general it is understood that the representatives
parties concerned in a combination ownership of any or
51 pole line, shall decide upon the details of the combination i
question, and the other members of the Committee shall n
concern themselves in the matter, only those whose interests are
stake entering into the agreement.

14th. That any number of members who may be present at
regular meeting shall comprise a quorum and may act upon an
question, a majority of the same being sufficient to make a rulin
in any matter which may come before the Committee, due notic
however, having been served in writing three days previous to th
meeting.

Notice of Business.

15th. That no point may be brought up at one meeting an
passed upon at the same meeting unless all members of the Com
mittee are present, and in the event of any member or members b
ing absent, the matter must be placed on the table until the nex
meeting following, in order that the regular written statement o
the question to be put before the Committee may be sent to eac
member, giving him an opportunity to be present at the meeting.

Term of Agreement.

16th. Any party hereto may withdraw from this agreement b
giving six months' notice in writing to each of the other partie
hereto, and in the absence of such notice the term of this agree
ment shall be from the time of signing thereof until a majority
of the parties hereto shall by a vote of their officials, conclude
to discontinue the arrangement, and in that event the agreement

itself ceases; but the ownership in any combination poles having been purchased by various companies, shall stand until the end of the life of the said individual poles, after which the reconstruction following thereupon may be done by the parties under their original franchises in any manner allowed by law at the time, as though this agreement had never existed.

52 Compensation of Committee.

17th. That each party shall give the services of its member of the Committee without charge. The Committee shall arrange the salary and expenses of the secretary, as conditions and circumstances may point out, and each party shall pay its proportion of this expense. Thee services of this Secretary may be discontinued at any time, at the discretion of the Committee, if they determine that he is not needed further, and in that case, the Committee shall elect one of its members to act as secretary, such member, however, to continue to have a vote the same as the other members, but to receive no salary.

Intention of Agreement.

18th. That it is the intention of this agreement that all of the terms of the agreement and of the specifications attached hereto, and all of the acts of the Committee duly passed, shall be carried out in accordance with the intent of this agreement, and the specifications attached, and that in the event that a party shall refuse to carry out its portion of this agreement, or shall refuse to pay bills rendered in accordance with this agreement, and the decisions of the Committee, that it shall be obliged to remove its wires from the poles. It is understood and agreed that this contract shall go into effect and be in operation on and after January 1, 1907.

Specifications.

Combined Use of Existing Poles.

1st. In combination use of existing poles, the combining parties will use the poles of the party having the highest or most satisfactory poles on the side of the street which the combining parties may determine upon.

Pole Specifications.

2nd. No poles will regularly be considered in this agree-
53 ment which are less than 30′ in length or more than 60′, and each pole shall be rates as a 30, 35, 40, 45, 50, 55, or 60 ft. pole, according to its length, it being rates as an even 5 ft. equal to or next below its actual length. No poles smaller than 8″ tops need by used by the Committee unless they are particularly desirable. Any poles not equal to this specification may be considered if the Committee sees fit. If any line of poles is to be used as a combination

pole line, and it is not previously supplied with pole steps, the same must be stepped by the owners as the cost of steps is included in rates mentioned below. These poles if not in good condition regarding the painting, must also be painted by the owners as directed by the Committee, at the expense of the said owners, giving them the standard color, which will indicate that the poles have become combination poles. All poles shall be painted a green color, approved by the Committee, with a black base, extending 5 ft. above the sidewalk. All of the owners of any pole shall stencil their names or initials on the said pole in a single line stencil running horizontally around the pole. This stencil to be of black, painted on the green part of the pole immediately above the black of the base.

Reconstruction by Owning Parties.

3rd. When a party desires to use poles on one side of any street where poles exist and the said existing poles are not suitable for combination use, then one of the owners of the poles existing on this side of the street may set new poles of a standard size and length sufficient for the combined use of themselves and the parties desiring space on these poles, and said constructing party shall then have the right to the top position of the new poles, unless otherwise ordered by the Committee on account of this position conflicting with other positions held by the same party in or near this locality. Each party shall place its cross arms and wires on the new poles and the con-
54 structing party shall remove the old poles of the parties determining to use the combination poles. Each party desiring to use the new poles shall then be charged for its proportion as specified below.

Reconstruction by New Coming Parties.

4th. Should the party or parties owning the existing poles not desire to construct the new pole line, then one of the parties making the request to enter the combination use of the poles, shall construct a pole line suitable for the combined use of itself and the parties owning the existing poles, and any other parties who may desire to have space on these poles. The party building the same shall have the right to the top position, unless otherwise ordered by the Committee, on account of this position conflicting with other positions held by the same party in or near this locality. Each party shall place its cross-arms and wires on the new poles, and the party doing the construction work shall then remove/ the old poles and deliver them to their original owners at any point in the city specified by the said owners. The constructing party shall then bill each of the combining parties its proportion of the new poles, as per rates specified below.

New Poles.

5th. In the event of any party intending to construct a new pole line, it shall notify the other members through the Committee as

specified above, and shall make room on its new poles for the use of any other parties who express their intention to combine in the use of said poles. It shall have the right to the top position as in section 4: the constructing party billing each of the combining parties its proportion of the new poles, as specified below.

Pole Fitting.

6th. The standard size of cross-arms shall be 3¾″ x 4¾″ x 7′ with the pole pins not less than 15″ from the center of the pole, but the length and size of these arms may be varied by the Committee, as desired, provided that a sym-etrical appearance of the pole be maintained. Cross-arms to be braced with suitable iron braces. These are also to be maintained the same size and of sym-etrical appearance on any one street and shall usually be 26″ long and approximately 1¼″ wide. Cross-arms for regular work shall be spaced about 2′ between centers. The size and spacing of cross-arms may, however, be varied by the Committee to suit any special conditions which may arise, such as high tension lines, railway cross-arms occupying the lowest position and any others at the discretion of the Committee.

Manner of Occupying.

7th. Any party occupying poles shall do so as agreed upon in advance of entering into the combination, and no other parties shall be allowed to enter the combination or use the said poles without the unanimous consent of all the parties then using them under the combination agreement, and any new party shall occupy the said poles in such manner as shall be arranged for by the parties already using the said poles.

Transformers.

8th. Transformers when placed on combination poles shall be placed below all cross-arms with the exception of the cross-arms used by the railway companies, when this arm is placed at a height of approximately 24′ above the sidewalk. The transformers shall be placed on the clear side of the poles, and all wires from the transformers to their cross-arms shall be enclosed in suitable covering, either pipe or wooden molding of a form approved by the Committee.

Valuations.

9th. The valuation on which charges will be based will be at the rate of 35¢ per foot, including all of the sizes mentioned in paragraph 2 from 30′ to 60′ 8″ tops inclusive. Special rates shall be made for poles higher or lower than those above, if they are considered at all. This price is to include shaving, painting, stepping and setting the pole ready for use as directed by the Committee and shall apply to new poles only.

Stubs, 7½″ tops and over, 40¢ per foot.

Existing stubs, 7" tops and less, shall not be considered as of any value, but must be allowed to remain until naturally decayed or replaced by instructions of the Committee.

All new stubs will be 7½" tops or over.

Dead men, slugs and anchors, $5.00.

All poles set less than three years shall be valued as new poles at the above rates.

All poles set over three years and less than six years shall be valued at the same rate for that portion of the pole extending above the ground, but no value shall be placed on that portion in the ground.

All poles set over six years shall be valued at the above figures less 3½¢ per foot for each year or portion of a year, over six years for that portion of the pole extending above the ground, but no value shall be placed on that portion in the ground.

Charges.

10th. The owner or owners of a pole, new or old, which is to be used in combination with more parties, shall be allowed to bill against the said parties, amounts determined by the number of parties using the pole and the valuation of same, and the said amounts shall be due as soon as the parties, by their officials, have agreed to enter the combination, provided the said poles have been put in proper condition as specified in paragraphs above. Space for 1, 2 or 3 cross-arms for regular use, or for two cross-arms to hold one or two high tension three wire circuits, with or without two telephone wires elsewhere on pole, or one railway span, with or without one cross-arm and two or more telephone wires elsewhere on the pole, shall be considered one share. A space for one or two transformers or lighting fixtures will be considered as included in one share referred to above. No wires or fixtures whatever may be placed on a pole excepting by shareholders in such poles. The valuation of the stubs, poles, etc., having been determined as per section 9, charges will be made as a
57 fraction of the said valuation as follows:

When a combination is made, each incoming party shall pay the owner or owners that fraction of the valuation represented by the shares to be occupied by it, and the pole is then owned by the occupants thereof in proportion to the number of shares occupied by each. The proceeds so derived by the owners of a pole which was owned by more than one party shall be equally divided between such owners.

Space to be Occupied by Each Party.

11th. The space and the position to be occupied by each party shall be determined upon in advance of occupation, as provided in paragraph 8 of the Agreement.

Special Expenses.

12th. All maintenance work will be done by one of the shareholders in each pole or line of poles. Improvements in the appear-

nce of the poles, such as painting or dressing up the poles, shall be one at the request of any shareholder, and the expense of doing the ork shall be divided between the shareholders in proportion to the umber of shares held by each. The Committee shall determine hich shareholder is to do the work, and shall instruct him what to be done.

The maintenance of poles, such as moving the poles on account f grading or curbing, as ordered by the City, and any general work, ncluding the re-painting when the same is necessary, as also of pecial expenses, incurred for rights-of-way and replacing of poles, hall be similarly divided.

esponsibility of Railway Companies on Account of Side Strains.

13th. All work necessary to specially brace an existing pole line y adding blocks at the ground line or at the foot of the pole or any ther particular arrangement on account of the strains introduced by a railway span, shall be done at the expense of the railway s company purchasing shares in the pole, but in cases of constructing a line where curb stones already exist, the same shall e done in such a way as to hold the railway spans without additional pense to the railway company.

Renewing Poles Naturally Decayed.

14th. All poles which shall have been used as long as the Committee shall decide that they are safe, or satisfactory, or as long as e parties owning shares in the same desire to use them, shall be reaced by new poles, the work of constructing a new pole line being ne by one of the parties occupying the same, and this party shall ll the other parties the same as for the construction of other new les, as above. If there is no other determining cause to appoint e party to do the reconstruction work, then the Committee shall der the party occupying the top position on said poles to do the onstruction work. The party removing the poles and doing the w construction work as above, shall haul the poles so removed at own expense to a place designated by the Committee, this place ing within the City limits of Los Angeles, and here the poles shall sold at auction, due notice having been given to each party to this ntract, at a previous meeting, so that each party may be present d buy the poles if he so desires. The sale shall be conducted by e secretary of the Committee, and the proceeds of the sale shall be ided between the owners in proportion to the number of shares ned by each. If, however, the poles are to be used as per section of this specification, such auction sale need not take place.

Placing Poles for Railway Spans.

15th. In any case where an old pole line is being reconstructed or ew pole line constructed on either side of the street, or where a lway company is to enter a combination use of existing poles, the

said combined poles must be placed opposite to the poles across the street, so that the railway company can put their spans on
59 these poles without setting an additional line of poles on the said opposite side of the street.

Ownership of Poles Removed.

16th. When a combination pole line shall be determined upon where several lines of poles exist, the parties owning the poles, excepting those used for combination, shall remove their poles, and they shall be their own property, and each party shall place its wires and cross-arms on the combination pole line without expense to any one else.

Use of Old Poles.

17th. If in the combination use of poles, it is agreed that poles may be used which have previously been in service elsewhere, then the valuation of said poles shall be on the basis of a new pole of the same height, except for that portion which was in the ground; provided, however, that the pole is in other respects equal to a new pole.

In witness whereof, the parties hereto, have on the 10th day of October, 1906, caused their officials, duly authorized, to affix their signatures to these presents.

PACIFIC ELECTRIC RAILWAY COMPANY,
By H. E. HUNTINGTON.

S. H. ANDERSON,
Chief Electrician.

LOS ANGELES INTER-URBAN RAILWAY CO.,
By H. E. HUNTINGTON.

S. H. ANDERSON,
Chief Electrician.

Approved as to form,
W. H. TROWBRIDGE.

PACIFIC LIGHT & POWER COMPANY,
By A. C. BALCH.

E. A. BECK,
Supt. P. L.-P. Co.

LOS ANGELES RAILWAY COMPANY,
By HOWARD E. HUNTINGTON.

C. O. ANDERSON,
Supt. Line Dept.

EDISON ELECTRIC COMPANY,
By JOHN B. MILLER.

B. F. PEARSON, *R. E. C.*

Approved as to matter and terms.
A. L. SELIG.

LOS ANGELES GAS & ELECTRIC COMPANY,
By WM. BAURHYTE, *Second Vice-President.*

E. R. NORTHMORE,
Supt. Elect. Dist.

Approved as to form.
WM. A. CHENEY,
General Counsel.

LOS ANGELES PACIFIC RAILWAY COMPANY,
By T. R. GABE, *Gen'l Manager.*

H. H. LEE.

Approved as to form.
BICKNELL, GIBSON, TRASK, DUNN & CRUTCHER.

EXHIBIT "F."

This agreement, entered into by and between the Pacific Electric ilway Company, a corporation, the Los Angeles Inter-Urban Rail- y Company, a corporation, the Pacific Light & Power Company, a poration, the Los Angeles Railway Company, a corporation, the ison Electric Company, a corporation, the Los Angeles Gas & ctric Company, a corporation, and the Los Angeles Pacific Com- ny, a corporation, parties of the first part, and The Pacific Tele- one & Telegraph Company, a corporation, and the Home Tele- one & Telegraph Company, a corporation, parties of the second t, witnesseth:

First. The parties hereto refer to a contract dated October 10, 06, made by the parties of the first part hereto, and attached said ntract and make it a part of this agreement, one copy of which is possession of The Pacific Telephone & Telegraph Company, a ond copy in the possession of the Home Telephone & Telegraph mpany, and the third copy is in the possession of the Joint Pole mmittee.

Second. The parties of the first part agree that the parties of the ond part may become parties to said agreement dated October 10, 06, and the parties of the second part hereby agree to become rties to said agreement, and by virtue of this agreement the parties reto shall be bound by the terms and conditions of said contract reto referred to, as fully, to all intents and purposes, as if the said rties of the second part had originally entered into the said agree- nt with the parties of the first part.

In witness whereof, the parties hereto have on this 5th day of November, 1907, caused their officials, duly authorized, to affix their signatures to these presents.

PACIFIC ELECTRIC RAILWAY COMPANY,
By J. McMILLAN.

61 LOS ANGELES INTER URBAN RAILWAY COMPANY,
By J. McMILLAN.

PACIFIC LIGHT & POWER COMPANY,
By A. C. BALCH, *Gen. Mgr.*

LOS ANGELES RAILWAY COMPANY,
By HOWARD E. HUNTINGTON, *Gen. Mgr.*

EDISON ELECTRIC COMPANY,
By JOHN B. MILLER, *Pres.*

LOS ANGELES GAS & ELECTRIC COMPANY,
By WM. BAURHYTE, *Second Vice-President.*

LOS ANGELES PACIFIC COMPANY,
By T. R. GABEL, *Gen. Mgr.*

THE PACIFIC TELEPHONE & TELEGRAPH COMPANY,
By E. C. BRADLEY, *Vice-Pres.*

HOME TELEPHONE & TELEGRAPH COMPANY,
By A. B. CASS, *President.*

This is to certify that the above is an exact copy of supplementary agreement to general contract dated Oct. 10, 1906, entered into by the parties of the first part, and The Pacific Telephone & Telegraph Company and the Home Telephone & Telegraph Company.

JOINT POLE COMMITTEE,
By J. E. MACDONALD, *Secretary.*

E. C. BECK, *President.*

(Endorsed:) Original No. D 23. Eq. In the District Court of the United States, Southern District of California, Southern Division. Los Angeles Gas and Electric Corporation, Complainant, vs. The City of Los Angeles, et al., Defendants. Bill of Complaint and Injunction. Filed Mar. 29, 1917. Wm. M. Van Dyke, Clerk, by R. S. Zimmerman Deputy Clerk. Paul Overton, Herbert J. Goudge, H. C. Beach, 645 South Hill Street, Room 31, Los Angeles, Cal., Attorneys for Complainant.

62 In the District Court of the United States in and for the Southern District of California, Southern Division.

In Equity.

LOS ANGELES GAS AND ELECTRIC CORPORATION, Complainant,

vs.

THE CITY OF LOS ANGELES, a Municipal Corporation; FREDERICK T. WOODMAN, as Mayor of The City of Los Angeles; Board of Public Works of The City of Los Angeles and Lorin A. Handley, Patrick P. O'Brien, Owen McAleer, Members of and Constituting the Board of Public Works of The City of Los Angeles; the Department of Public Service of The City of Los Angeles and Reginald F. Del Valle, Louis H. Valentine, Meredith P. Snyder, John W. Kemp, and Byron Erkenbrecher, Members of and Constituting the Board of Public Service Commissioners of The City of Los Angeles; the City Council of The City of Los Angeles and Martin F. Betkouski, James S. Conwell, Frederick C. Langdon, Estelle Lawson Lindsey, Robert T. Brain, William A. Roberts, Foster C. Wright, Fred C. Wheeler, and John Topham, as Members of and Constituting the City Council of The City of Los Angeles; John L. Butler, Chief of Police of The City of Los Angeles, and Ezra T. Scattergood, Chief Engineer of the Bureau of Power and Light of The City of Los Angeles, Defendants.

Affidavit.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

C. A. Luckenbach, being first duly sworn, deposes and says:

That he is, and for twelve years last past has been, the Manager of Construction of Los Angeles Gas and Electric Corporation, complainant in the above entitled suit. That as such Manager of Construction it is his duty to lay out and supervise the construction of all additions and extensions to the electrical distribution system of said complainant. That he is familiar with the location and position of the poles and wires and other electrical apparatus and appliances of complainant in, along and upon York Boulevard
63 in the City of Los Angeles, County of Los Angeles, State of California. That he is also familiar with the location and position of the poles and wires and other electrical apparatus and appliances owned and controlled by The City of Los Angeles located and situated in, along and upon said York Boulevard.

That he has read the communication or notice of the Board of Public Works of The City of Los Angeles dated March 24th, 1917, addressed to said complainant, which said notice is set out in full in Paragraph XX of the Complaint in the above entitled suit.

That since reading said communication or notice affiant has per-

sonally visited said York Boulevard and has made an inspection of the poles, wires and appliances of complainant, and also the poles, wires and appliances of said City of Los Angeles located in, upon and along said York Boulevard, as aforesaid, and that affiant has particularly examined and inspected pole No. 18,597-G, referred to in said communication or notice from said Board of Public Works.

That if the Los Angeles Gas and Electric Corporation, complainant in the above entitled suit, should lower its wires on said pole No. 18,597-G to a 41 ft. 6 in. level, such wires would be brought within the distance from their wires prescribed and made unlawful by the laws of the State of California and the regulations of the Railroad Commission of said state.

That said wires would, after such removal, be brought within a distance of less than one foot from the low tension wires of the Pacific Light and Power Corporation, a corporation also engaged in the distribution of electrical energy in, along and upon poles and wires located at the intersection of York Boulevard and Avenue 50 in said city.

That said wires of complainant, when so placed in juxtaposition to the wires of said Pacific Light and Power Corporation, at or near the intersection of York Boulevard and Avenue 50, as afore-
64 said, would cause great danger to the life and limb of the employes of said complainant engaged in the work of operating and maintaining and repairing said wires and fixtures of said Los Angeles Gas and Electric Corporation, and that said wires, so placed, as aforesaid, would constitute a dangerous menace to the life and limb of consumers of said Pacific Light and Power Corporation and consumers of complainant now being supplied with electrical energy for domestic and other purposes, by reason of the danger of electrical energy being transmitted from the wires of the Los Angeles Gas and Electric Corporation to the wires of said Pacific Light and Power Corporation.

That some of said wires of said Pacific Light and Power Corporation carry electrical energy of a low voltage, which electrical energy is transmitted directly into and upon the premises of the consumers of said corporation; that said wires of said Los Angeles Gas and Electric Corporation carry electrical energy of a much higher voltage than some of said wires of said Pacific Light and Power Corporation; that if, by reason of the proximity of said wires of said corporations, electrical energy carried by the wires of complainant comes in contact with said wires of said Pacific Light and Power Corporation carrying a low voltage of electrical energy, said wires will immediately become so energized as to constitute a great and serious danger and menace to the life and limb and property of the consumers so supplied by said Pacific Light and Power Corporation, as aforesaid, and that such condition will also constitute a serious menace to the life and limb of the employes of the said Pacific Light and Power Corporation in working upon or along such wires of said corporation.

That affiant has personally examined and inspected pole No. 18,601-G, located at or near the intersection of York Boulevard and

Avenue 53 in said city, and referred to in said notice from said Board of Public Works. That said pole is owned jointly by
65 complainant, Los Angeles Gas and Electric Corporation, the Pacific Light and Power Corporation, and the Los Angeles Railway Company. Each of said companies owns and has the right to occupy a certain definite space or position upon said pole. That complainant, under such ownership, has the right to occupy a certain space at the top of said pole. That if complainant should lower its line-arm on said pole to a 36 ft. 6 in. level, using the 34 ft. 6 in. level for a buck-arm, for wires running north on Avenue 53, as set out in said notice from said Board of Public Works, complainant would be deprived of its property upon said pole.

That the lowering of said line-arm and said buck-arm on said pole No. 18,601-G to the distance required by said notice from said Board of Public Works would bring the wires of complainant now located on said buck-arm to a distance from the wires of the Pacific Light and Power Corporation attached to and located upon said pole in violation of the laws of the State of California regulating the distances and clearances of overhead electrical construction.

That if complainant should lower its said wires and said cross-arm and said buck-arm as required by said notice from said Board of Public Works, complainant would be deprived of the use of approximately ten feet of said pole No. 18,601-G.

Further deponent saith not.

C. A. LUCKENBACH.

Subscribed and sworn to before me this 28th day of March, 1917.

[SEAL.] WILLIAM B. BEIRNE,
Notary Public in and for the County of Los Angeles, State of California.

66 (Endorsed:) Original. No. D 23 Eq. In the District Court of the United States, Southern District of California, Southern Division. Los Angeles Gas and Electric Corporation, Plaintiff vs. The City of Los Angeles, et al., Defendants. Affidavit of C. A. Luckenbach. Filed Mar. 29, 1917. Wm. M. Van Dyke, Clerk, by R. S. Zimmerman, Deputy Clerk. H. C. Beach, Paul Overton, Herbert J. Goudge, 645 South Hill Street, Room 31, Los Angeles, Cal. Attorneys for Complainant.

67 In the District Court of the United States in and for the Southern District of California, Southern Division.

In Equity.

LOS ANGELES GAS AND ELECTRIC CORPORATION, Complainant,

vs.

THE CITY OF LOS ANGELES, a Municipal Corporation; FREDERICK T. WOOLMAN, as Mayor of The City of Los Angeles; Board of Public Works of The City of Los Angeles, and Lorin A. Handley, Patrick P. O'Brien, Owen McAleer, Members of and Constituting the Board of Public Works of The City of Los Angeles; the Department of Public Service of The City of Los Angeles and Reginald F. Del Valle, Louis H. Valentine, Meredith P. Snyder, John W. Kemp, and Byron Erkenbrecher, Members of and Constituting the Board of Public Service Commissioners of The City of Los Angeles; the City Council of The City of Los Angeles, and Martin F. Betkouski, James S. Conwell, Frederick C. Langdon, Estelle Lawton Lindsey, Robert T. Brain, William A. Roberts, Foster C. Wright, Fred C. Wheeler, and John Topham, as Members of and Constituting the City Council of The City of Los Angeles; John L. Butler, Chief of Police of The City of Los Angeles, and Ezra T. Scattergood, Chief Engineer of the Bureau of Power and Light of The City of Los Angeles, Defendants.

Affidavit.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

E. R. Northmore, being first duly sworn on his oath according to law, deposes and says:

That he is now, and for more than eleven years last past has been, Superintendent of Electric Distribution of Los Angeles Gas and Electric Corporation, complainant herein. That as such he is and has been familiar with the line of poles and wires constituting a part of complainant's distributing system located upon and along York Boulevard, a public street in said City of Los Angeles.

That affiant has read the Bill of Complaint filed herein,
68 and has read and is familiar with the purported notice served upon complainant under date of March 24th, 1917.

That since said 24th day of March, 1917, affiant has inspected the poles and wires of said complainant situate on and along said York Boulevard, as aforesaid, and the poles and wires on said York Boulevard now operated and maintained by the City of Los Angeles as a part of its electrical distribution system.

That affiant is familiar with the location and the construction situated upon pole No. 18,997-G, located at the intersection of York Boulevard and Avenue 50. That said pole is owned in fee by the

Los Angeles Gas and Electric Corporation, complainant herein, and that if the requirements in said notice so served upon complainant are complied with, the high voltage wires of the Los Angeles Gas and Electric Corporation will be brought within approximately the distance of one foot of the low voltage or secondary wires and the high voltage or primary wires of the Pacific Light and Power Corporation which cross York Boulevard on Avenue 50 at this intersection. That in the opinion of affiant this would create an extremely dangerous crossing of electrical wires, inasmuch as said crossing occurs at a point where the wires are not in a fixed position upon poles but are subject and liable to slack and sag, and side strains, and that said wires, if they come into proximity with each other, are liable to short-circuit, or ground, and cause the wires of either of said corporations to be precipitated into the street, to the great danger and hazard of the public in general, and to vehicles and pedestrians.

That, in addition thereto, such crossing would also make it extremely dangerous for the employes of the Los Angeles Gas and Electric Corporation and the employes of the Pacific Light and Power Corporation, who are accustomed to go upon and near said poles and wires to repair and maintain the same.

That, in addition thereto, said crossing would be highly
69 dangerous to the consumers of said Pacific Light and Power Corporation in, upon and along said York Boulevard and in the vicinity thereof, in that the secondary wires of said Pacific Light and Power Corporation are used to carry and convey electricity to the homes of consumers and any contact of electricity from the wires of complainant with those of the secondary wires of said Pacific Light and Power Corporation is liable to be transmitted to the homes of the consumers of said Pacific Light and Power Corporation and thereby create great menace to the life, limb and property of said consumers.

That such crossing, in addition to the danger and menace created thereby, is in violation of the laws of the State of California and the rules and regulations of the Railroad Commission thereof.

That since said 24th day of March, 1917, affiant has inspected and is familiar with pole No. 18,601-G, located at or near the intersection of York Boulevard and Avenue 53, both public streets within the City of Los Angeles. That said pole is jointly owned by the Pacific Light and Power Corporation, complainant, and the Los Angeles Railway Company, each of said companies owning an undivided one-third interest therein. That if the orders and requirements contained in said notice are complied with, it will result in the bringing of complainant's 2,400 volt wires to within a distance of less than four feet from the low voltage secondary wires of the Pacific Light and Power Corporation located and fixed upon said pole, which is in violation of the laws of the State of California.

That by lowering the construction of said complainant as required by said order, complainant is deprived of approximately ten feet of the top of the pole, and by being deprived of this part of the pole complainant is unable to place the construction that will be necessary to supply customers and consumers upon and along said York Boule-

yard and the territory in the vicinity thereof. That the wires
70 of complainant upon and along said York Boulevard are now, and for a some time past have been, used to convey electric energy for the purpose of serving customers located upon and along said York Boulevard and in the vicinity thereof, and complainant is now supplying consumers with electric energy for domestic uses over said lines of wire.

That affiant is familiar with and had charge of the erection and construction of said line of poles and wires upon and along said York Boulevard. That the poles and wires of complainant upon and along said York Boulevard were constructed and erected in about the year 1914; and at the time of the construction and *and* erection of said poles and wires all due care was used and regard exercised by affiant in the erection and construction thereof for the public health, safety and convenience, and at the same time to serve the interests of complainant by providing for the present needs of said system and those needs which affiant anticipated would arise in the future. That at the time affiant erected and constructed said lines of poles and wires, the City of Los Angeles had not constructed or erected any lines of poles or wires for electrical distribution or any part of its distributing system, upon or along said York Boulevard. That said City of Los Angeles did not erect or construct or maintain any lines of poles or wires for electric distribution upon and along York Boulevard until the latter part of the year 1916. That since affiant's line of poles and wires were constructed and erected along and upon said York Boulevard the same have not been moved and they now remain in the positions as originally constructed.

Further affiant saith not.

E. R. NORTHMORE.

Subscribed and sworn to before me this 28th day of March, 1917.

[SEAL.] WILLIAM B. BEIRNE,
Notary Public in and for the County of Los Angeles, State of California.

71 (Endorsed:) Original. No. D 23 Eq. In the District Court of the United States, Southern District of California. Southern Division. Los Angeles Gas and Electric Corporation, Plaintiff, vs. The City of Los Angeles et al., Defendants. Affidavit of E. R. Northmore. Filed Mar. 29, 1917. Wm. M. Van Dyke, Clerk. by R. S. Zimmerman, Deputy Clerk. H. C. Beach, Paul Overton, Herbert J. Goudge, 645 South Hill Street, Room 31, Los Angeles, Cal., Attorneys for Complainant.

2 In the District Court of the United States in and for the Southern District of California, Southern Division.

In Equity.

os Angeles Gas and Electric Corporation, a Corporation, Complainant,

vs.

he City of Los Angeles, a Municipal Corporation; Frederick T. Woodman, as Mayor of The City of Los Angeles; Board of Public Works of The City of Los Angeles and Lorin A. Handley, Patrick P. O'Brien and Owen McAleer, Members of and Constituting the Board of Public Works of The City of Los Angeles; Department of Public Service of The City of Los Angeles and Reginald F. Del Valle, Louis H. Valentine, Meridith P. Snyder, John W. Kemp and Byron Erkenbrecher, Members of and Constituting the Board of Public Service Commissioners of The City of Los Angeles; the Council of The City of Los Angeles and Martin F. Betkouski, James S. Conwell, Frederick C. Langdon, Estelle Lawton Lindsey, Robert T. Brain, William A. Roberts, Foster C. Wright, Fred C. Wheeler and John Topham, as Members of and Constituting the Council of The City of Los Angeles; John L. Butler, Chief of Police of The City of Los Angeles, and Ezra F. Scattergood, Chief Electrical Engineer of the Bureau of Power and Light of The City of Los Angeles, Defendants.

Order to Show Cause and Temporary Restraining Order.

The above entitled cause having come on to be heard before the ove entitled Court and the Honorable Benjamin F. Bledsoe as idge thereof, on the application of complainant for an order rected to the defendants, and each of them, requiring them, and ch of them, to show cause to this Court, at a time and place to be xed by this Court, why an Injunction pendente lite should not be anted enjoining the defendants, and each of them, their officers, gents, servants, attorneys and employees, from in any wise or in y manner enforcing, acting under or carrying into, or attempting to carry into effect any of the provisions, or any part of the provisions, of a purported ordinance of The City of Los Angeles entitled:

"An ordinance providing for the removal or relocation of poles d other properties located in public streets and other public places The City of Los Angeles, when necessary in order that the munic- al electrical street lighting system may be constructed, operated d maintained therein."

id ordinance being numbered 36,125 (New Series).

And the Court having read and considered the verified bill of com- aint filed by complainant herein and the affidavits of C. A. Lucken-

bach, Esq., and E. R. Northmore, Esq., and good cause being shown to the Court, and the Court being fully advised in the premises,

It is now, therefore, ordered that the defendants above named, and each of them, appear before the District Court of the United States in and for the Southern District of California, Southern Division, at the court room of said Court in the United States Court House situate on the fourth floor of the United States Post Office Building in the City of Los Angeles, State of California, on the 2 day of April 1917, at the hour of 2 o'clock, P. M. on said day, then and there to show cause, if any they have, why the injunction pendente lite prayed for in said bill of complaint on file herein should not issue.

It further appearing to the Court from said bill of complaint on file herein and the affidavits of C. A. Luckenback, Esq., and E. R. Northmore, Esq., on file herein, that unless a preliminary restraining order pending the return of the above said order to show cause is granted by this Court enjoining and restraining defendants, and each of them, their officers, agents, servants, attorneys and employees, from in any wise or in any manner enforcing, acting under or carrying, or attempting to carry, into effect any of the provisions, or any part of the provisions, of a said purported ordinance of The City of Los Angeles numbered 36,125 (New Series) hereinbefore mentioned, that complainant is liable to suffer immediate and irreparable loss, injury and damage, and the Court being fully
74 advised in the premises,

It is now, therefore, ordered, adjudged and decreed: that pending the return of said order to show cause, and the further order of this Court in the premises, that said defendants, and each of them, be, and they are hereby, enjoined and restrained from in any wise or in any manner enforcing, acting under or carrying, or attempting to carry, into effect any of the provisions, or any part of the provisions, of a purported ordinance of The City of Los Angeles entitled:

"An ordinance providing for the removal or relocation of poles and other properties located in public streets and other public places of The City of Los Angeles, when necessary in order that the municipal electrical street lighting system may be constructed, operated and maintained therein."

said ordinance being numbered 36,125 (New Series).

It is further ordered that a copy of this order certified under the hand of the Clerk and under the Seal of this Court, and a copy of said bill of complaint on file herein, together with copies of the affidavits of C. A. Luckenbach, Esq., and E. R. Northmore, Esq., on file herein, be served on each of defendants above named.

Providing that a copy of this order, together with a copy of said bill of complaint and a copy of each of said affidavits may be served on Frederick T. Woodman, Mayor of The City of Los Angeles, and said service shall be a sufficient service for all the purposes of this order on said The City of Los Angeles, a municipal corporation.

rederick T. Woodman, Mayor of said city and John L. Butler, hief of Police of The City of Los Angeles;

And provided further that a copy of this order, together with a py of said bill of complaint and said affidavits may be served on orin A. Handley as President of Board of Public Works of The ty of Los Angeles, and said service shall be a sufficient service for l the purposes of this order on the Board of Public Works of The City of Los Angeles and Lorin A. Handley, Patrick P. O'Brien, and Owen McAleer, members of and constituting the Board of Public Works of The City of Los Angeles;

And provided further: that a copy of this order, together with a py of said bill of complaint on file herein and said affidavits may served on Reginald F. Del Valle as President of the Board of ublic Service Commissioners of The City of Los Angeles, and such rvice shall be a sufficient service for all of the purposes of this der on defendant Department of Public Service of the City of s Angeles and on Reginald F. Del Valle, Louis H. Valentine, eredith P. Snyder, John W. Kemp and Byron Erkenbrecher, emembers of and constituting the Board of Public Service Comssioners of The City of Los Angeles, and on Ezra F. Scattergood, hief Electrical Engineer of the Bureau of Power and Light of The y of Los Angeles;

And provided further: that a copy of this order, together with copy of said bill of complaint, may be served on Martin F. tkouski as President of the Council of The City of Los Angeles, d such service shall be a sufficient service for all of the purposes this order on said Council of The City of Los Angeles, and such vice shall be a sufficient service for all of the purposes of this order said Council of The City of Los Angeles and on Martin F. tkouski, James S. Conwell, Frederick C. Langdon, Estelle Lawton ndsey, Robert T. Brain, William A. Roberts, Foster C. Wright, ed C. Wheeler and John Topham as members of and constituting e Council of The City of Los Angeles.

Dated at Los Angeles, California, this 29th day of March, 1917.

BLEDSOE, *Judge*.

All service of process hereinabove provided to be made not less n three days previously to April 2, 1917.

(Endorsed:) No. D 23 Eq. In the District Court of the United States, Southern District of California, Southern ision. Los Angeles Gas and Electric Corporation Complainant The City of Los Angeles, et al., Defendants. Order to show se and Temporary Restraining Order. Filed Mar. 29, 1917. n. M. Van Dyke, Clerk, by R. S. Zimmerman, Deputy Clerk. C. Beach, Paul Overton, Herbert J. Goudge, 645 South Hill eet, Room 31 Los Angeles, Cal., Attorneys for Complainant.

77 In the District Court of the United States in and for the Southern District of California, Southern Division.

D-23. Equity.

LOS ANGELES GAS & ELECTRIC CORPORATION, a Corporation, Complainant,

vs.

THE CITY OF LOS ANGELES, a Municipal Corporation, et al., Defendants.

Answer of the Defendants to Bill of Complaint for Injunction.

Come now the defendants and answering the complainant's bill of complaint herein, allege and deny as follows:

For a first defense to the bill of complaint herein, said defendants say:

That said bill of complaint does not, nor does any part thereof, state any matter of equity entitling the complainant to the relief prayed for, nor are the facts as stated therein, sufficient to entitle the complainant to any relief against the defendants or any of them.

For a second and further defense to said bill of complaint said defendants say:

That it does not appear from the facts stated in said bill of complaint that this court has jurisdiction over the subject matter of this cause.

For a third and further defense to said bill of compalint said defendants say:

78 I.

Said defendants, answering paragraph XI of the bill of complaint herein allege, that they have no information or belief sufficient to enable them to answer the allegations thereof as to the number of complainant's consumers, or the value of its property in said City of Los Angeles, and on that ground deny that the number of complainant's consumers exceeds thirty-five thousand, or that the value of complainant's property dedicated, or engaged, or used in the public service, exceeds the sum of $7,500,000., or any other sum or amount in excess of the sum of $4,000,000.

II.

Said defendants, answering paragraph XII of the bill of complaint herein, deny that, in the placing of its poles or wires or conduits, or other apparatus or appliances, upon the public streets, or places, or thoroughfares, in said City, complainant, or its predecessors in interest, selected those points or localities which were calculated to serve the best interest of the public, or the best interest of

any person other than said complainant, or its predecessors in interest.

Defendants further deny that the poles and wires mentioned in said paragraph XII as having been erected by complainant and its predecessors in interest, or by either or any of them, or any of such poles or wires, are, or that each or any of them, is, not capable of separation from the balance of complainant's distributing system without great expense or inconvenience, or any considerable expense or inconvenience, or without the possible or probable loss, or any loss, of consumers, or the interruption of service of complainant.

III.

Said defendants, answering paragraph XIII of the bill of complaint herein, deny that The City of Los Angeles, or the defendant, Department of Public Service of the City of Los Angeles, or the defendants, Reginald F. del Valle, Meredith P. Snyder, Louis H. Valentine, John W. Kemp and Byron Erkenbrecher, as members of and constituting the Board of Public Service Commissioners of said City, have been, for any period of time last past, or now are, engaged in the erection or construction or operation of a distributing system for the distribution or sale of electrical energy to be used for the purpose of lighting the streets or public places or thoroughfares of said City, or the supplying to the inhabitants, or others in said City, of light for domestic or commercial purposes, at a profit.

IV.

Said defendants, answering paragraph XIV of the bill of complaint herein, deny that the extension or part of the alleged distributing system of complainant, referred to in said paragraph, was designed for the purpose, or with the intent, of supplying light for domestic or commercial uses to the inhabitants of said City residing in or near the vicinity of York Boulevard, mentioned in said paragraph, or elsewhere, or at all, or that at all, or any, time since the year 1913, except since January 1, 1917, said complainant has maintained or used said alleged extensions or part of said distributing system, for the purpose of conveying electrical energy upon or along said York Boulevard for the purpose of supplying light for domestic or commercial uses to the inhabitants of said City, residing in or near the vicinity of said York Boulevard.

V.

Said defendants, answering paragraph XVI of the bill of complaint herein, deny that from the poles set and located by defendants upon and along said York Boulevard, as alleged in said paragraph XVI, are suspended or carried wires, conduits or other apparatus carrying or transmitting or designed to carry or transmit or now carrying or transmitting, large or dangerous quantities, or any quantity of electrical energy in danger-

ous or unlawful proximity to the wires, poles, conduits or other apparatus, or any thereof, maintained by complainant upon or along said York Boulevard, or that the wires carried or suspended upon the poles so erected by defendants upon or along said York Boulevard, or any of said poles, were or are designed or constructed, or are used or operated or maintained, upon said poles for the purpose of supplying electrical energy for light for domestic or commercial uses, or any other use or purposes, at a profit.

VI.

Said defendants, answering paragraph XVIII of the bill of complaint herein, deny that, in order to escape from the provisions of the injunction pendente lite, mentioned in the said paragraph, or to escape from the anticipated result, or any result, of the trial of the case mentioned in said paragraph, or the judgment or decree of court to be entered therein, or in order to enable them, or any of them, to construct or erect parts, or any part, of the electrical distributing system of said City of Los Angeles, without the expense or costs that would be incurred in erecting or constructing said system at a lawful or safe distance from the poles or wires of complainant in the streets, throughfares or public places of The City of Los Angeles, or, in order that, in the event, said municipal electric distributing system or the poles or wires or appliances thereof were constructed or erected in alleged dangerous or unlawful, or other, proximity or juxtaposition to the wires or poles or appliances of said complainant, or any of them, they, or each, or any of them might escape from or avoid the trouble or inconvenience or expense or costs of placing or locating said municipal poles or wires, or
81 any of them, so as to comply with the laws of the State of California, or the rules or regulations of the Railroad Commission thereof, or in order to escape, avoid or render ineffective the provisions of said injunction pendente lite or any contemplated or anticipated result of said action, or under the pretense of regulating the electric distributing systems of public service corporations using poles or wires in said City of Los Angeles, defendants Department of Public Service of the City of Los Angeles, or Reginald F. del Valle, Meredith P. Snyder, Louis H. Valentine, John W. Kemp, or Byron Erkenbrecher, as members of or constituting the Board of Public Service Commissioners of said City, or otherwise, or E. F. Scattergood, Chief Electrical Engineer of the Bureau of Power & Light of the City of Los Angeles, or any of them, did, themselves or by or through their agents, servants or attorneys, or any servant, agent or attorney, or otherwise, cause or procure the members of or constituting the City Council of the City of Los Angeles, or Frederick T. Woodman, as Mayor of said City of Los Angeles to pass or adopt on the 7th day of March, 1917, or at any other time, or at all, the ordinance mentioned in said paragraph XVIII.

VII.

Defendants, answering paragraph XIX of the bill of complaint herein, deny that the ordinance referred to in paragraph XVIII of

the complainant's bill of complaint herein, and numbered 36125, (New Series) was passed or adopted not as a police measure or in the lawful exercise of the police powers of said municipality, but solely or at all for the purpose or with the intent or design of securing to said City or said Department of Public Service the supplying of the complainant in or the ousting of complainant from the alleged advantageous positions or locations or places for poles or wires
82 occupied by complainant, upon or along the public streets, places or thoroughfares in said City, or elsewhere, or for the purpose or with the design or intent of depriving the complainant of the right to the use of said positions or locations, or of enabling said defendant The City of Los Angeles, its officers or agents, servants, or employees, or the defendant Board of Public Service Commissioners, or the defendant Ezra F. Scattergood, as Chief Electrical Engineer of the Bureau of Power and Light of the City of Los Angeles, or any of them, to construct, erect or maintain a municipal electric distributing system at less cost or expense than would otherwise be incurred, but on the contrary, said defendants allege that said Ordinance No. 36125 (New Series) referred to in paragraph XVIII of the bill of complaint herein, was passed and adopted solely as a regulatory measure and in the lawful exercise of the police powers of said municipality.

VIII.

Said defendants, answering paragraph XX of the bill of complaint herein, deny that, with the design or purpose or intent of enabling said defendants, or any of them, to maintain in their present fixed or alleged unlawful or dangerous positions the wires or poles or other electrical equipment or apparatus of said municipal electrical distributing system upon or along said York Boulevard, or elsewhere, or for the purpose or with the intent or design of securing for said municipal distributing system of said City, or of supplanting complainant in, the positions heretofore or now occupied by the poles or wires of complainant or its predecessors in interest upon or along said York Boulevard, or elsewhere, or for the purpose or with the intent or design of escaping or avoiding the writs of injunction mentioned in paragraph XVIII of the bill of complain*ant* herein, or for the purpose or with the intent or design of escaping or avoid-
83 ing the increased cost or expense of reconstructing said municipal distributing system upon or along said York Boulevard so as to comply with the provisions of said decree or writs of injunction above referred to, or the laws of the State of California, or the rules or regulations of the Railroad Commission thereof, said defendants Department of Public Service of the City of Los Angeles or said defendants Reginald F. del Valle, Louis H. Valentine, Meredith P. Snyder, John W. Kemp or Byron Erkenbrecher, as members of or constituting the Board of Public Service Commissioners of said City, or otherwise, or said defendant Ezra F. Scattergood, as Chief Electrical Engineer of said Bureau of Power & Light of the City of Los Angeles, or any thereof, caused or procured said defendants the

Board of Public Works, or Lorin A. Handley, Patrick P. O'Brien or Owen McAleer, or any thereof, as members of or constituting the Board of Public Works of The City of Los Angeles, or otherwise, to deliver to complainant, on the 24th day of March, 1917, or at any other time, the notice mentioned in paragraph XX of the bill of complaint herein.

IX.

Said defendants, answering paragraph XXI of the bill of complaint herein, allege that they have no information or belief sufficient to enable them to answer, and on that ground they deny, that the complainant herein owns jointly, in conjunction with other public service corporations having franchises to occupy the public streets or places or thoroughfares of said municipality, or in conjunction with any other person, the poles mentioned in said paragraph XXI, or any thereof, or that certain space, or any space, on said alleged jointly owned poles, for the support of complainant's wires, or apparatus or appliances, is defined or granted or reserved to complainant under or by virtue of an alleged contract or agree-
84 ment called "The Joint Pole Contract," referred to in paragraph XXI of the bill of complaint herein, or elsewhere, or at all, and on the same ground, said defendants deny that, the complainant would be unable to occupy any other position on the pole mentioned in said paragraph XXI of said bill of complaint as Pole No. 18,597-G, than that which it now occupies, by reason of the alleged fact that all other positions that can be lawfully occupied upon said pole are now granted or reserved to other parties to said alleged Joint Pole Contract, or for any other reason, or at all, or that complainant, if required to move from its location on said pole, as directed in said notice, would have no place upon said pole at which it could lawfully attach or maintain its wires.

Said defendants, further answering paragraph XXI of the bill of complaint herein, deny, that in all or any cases in which removals or changes of wires are directed or ordered to be made by said notice, complainant, if required to make such removals or changes, as directed, or any of such removals or changes, will be required to remove its wires from a more advantageous position to a less advantageous position on said poles, or elsewhere; or that, in all or any cases in which removals or changes are specified or required to be done or performed in said notice, complainant, if required to make such changes or removals as directed, would be deprived of any right to the use or occupation of the positions or locations, or any thereof, now lawfully, or otherwise, occupied by its wires or other apparatus on said street, in any manner whatsoever, or at all.

X.

Said defendants, answering paragraph XXII of the bill of complaint herein, deny that said ordinance mentioned in paragraph XVIII of the complaint herein, is invalid or illegal, or of no force or effect, for all or any of the alleged reasons set forth in said
85 paragraph XXII.

XI.

Said defendants, answering paragraph XXIII of the bill of complaint herein, deny that said ordinance mentioned in paragraph XVIII of the bill of complaint herein, or said notice mentioned and fully set forth in paragraph XX of the bill of complaint herein, is unjust, unreasonable, arbitrary, confiscatory, or contrary to, or in violation of, Section I of Article V, of the Constitution of the United States, or that the property or rights of complainant herein are thereby taken by defendants, or any of them, without just compensation, or otherwise, or at all, or that complainant is thereby, or otherwise, deprived of its property or rights without due process of law, or at all.

Defendants deny that said ordinance and notice are, or that either of them, is, illegal, or void, or contrary to, or in violation of Section 14 *or* Article 1 of the Constitution of the State of California, or that the private rights or property of the complainant herein are taken by defendants, or any of them, without just compensation having first been made to, or paid into court for complainant, or are taken by defendants, or any of them, or at all.

Defendants deny that said ordinance and notice, are, or that either of them is, invalid or illegal, or of no lawful force or effect, for the alleged reasons set forth in said paragraph XXIII, or any thereof, or any other reason, or that the same are, or that either of them is, an unlawful, arbitrary or confiscatory, attempted exercise of the police power lawfully vested in said municipality for the alleged illegal, or other, design, purpose or intent of securing to said City of Los Angeles, acting in a proprietary capacity or exercising a proprietary function, or otherwise, the rights, property or franchises of the complainant herein, without compensation to said complainant,
86 or without the exercise of the power of eminent domain vested in said municipality, or in any manner whatsoever, or at all.

Said defendants further deny that said ordinance and said notice are, or that either of them is, null, void, illegal, unlawful, contrary to, or in violation of Section 1 *or* Article 4 of the Constitution of the United States, for all or any of the reasons set forth in said paragraph XXIII, or that complainant is thereby or otherwise, or at all, deprived of its property without due process of law, or is denied the equal protection of the laws.

XII.

Defendants, answering paragraph XXIV of the bill of complaint herein, deny, that in giving the directions contained in the notice mentioned in paragraph XX of the complaint herein, said defendants, or any of them, acted under or in pursuance of any invalid or illegal ordinance, or are endeavoring unlawfully or unconstitutionally, or otherwise, or at all, to secure or obtain for the said City of Los Angeles or the said municipal electric distributing system of

said City the valuable, or any, rights, or property or franchises of the complainant herein, or are seeking to deprive the complainant of the same without due process of law, or at all.

Defendants, further answering paragraph XXIV of the bill of complaint herein, deny that they, or any of them, threaten or intend to, or unless restrained and enjoined by order of this court will, in each or every case, or instance, or in any case or instance, where poles, wires, apparatus or appliances of complainant, or any thereof, are situate in an advantageous, convenient or economical or other situation or location, which, as alleged in said paragraph XXIV, is envied, coveted or desired by defendants, or any of them, for the pur-

87 pose of conveniently, economically or otherwise establishing or maintaining an electrical distributing system for the distribution by the City of Los Angeles or the Board of Public Service Commissioners of said City, of Electrical energy to private consumers, or more advantageously or effectively, or otherwise competing with complainant, order or direct said complainant, under the authority of the aforesaid ordinance, or otherwise, to remove from said locations, or any thereof, such poles, wires, apparatus or appliances, or any thereof, or in the event of the refusal of complainant to comply with such order or direction, said defendants, or any of them, threaten or intend to, or, unless restrained or enjoined by the order of this court will, remove from their locations, such poles, wires or apparatus by force, or that any of the defendants herein, other than the Board of Public Works of said City, intend or threaten to, or will, make or give any order or direction to said complainant, under the authority of the aforesaid ordinance to remove from said locations, or any thereof, such poles, wires, apparatus or appliances, or any thereof, or that said Board of Public Works threaten or intend to, or will, make or give any order or direction to said complainant under the authority of the aforesaid ordinance, to remove from said locations, or any thereof, such poles, wires, apparatus or appliances, or any thereof, excepting in cases and under conditions specifically set forth in said ordinance, to wit: whenever it shall appear to said Board of Public Works that the removal or relocation of any pole, anchor, crossarm, wire, street lamp, or any other fixture, appliance or structure, owned or controlled by complainant, and located in, upon, over or under any public street or public place of said City of Los Angeles, is necessary in order that the municipal electrical street

lighting system of said city, or a part thereof, may be erected,

88 operated or maintained in such public street or public place.

Defendants, further answering paragraph XXIV of the bill of complaint herein, deny, that before or since the passage of said ordinance, referred to in paragraph XVIII of the bill of complaint herein, or since the commencement of the construction of said distributing system of the City of Los Angeles, or at any other time, or at all, the said defendant The City of Los Angeles, or the said defendants Department of Public Service or the City of Los Angeles, or the defendants the Board of Public Service Commissioners, or the defendant Ezra F. Scattergood, or any of them, or their

agents, servants, attorneys or employees, or any of them, have adopted a threatening, arbitrary or overbearing attitude or course of conduct toward complainant or its property or franchises, in the respects alleged in said paragraph XXI, or in any other respect, or otherwise, or at all.

XIII.

Said defendants answering paragraph XXV of the bill of complaint herein, deny that by the enforcement of said ordinance said complainant will be thereby immediately or irreparably or materially, or at all, damaged, or will be subjected to or harassed by a multiplicity of actions or judicial proceedings.

XIV.

Said defendants answering paragraph XXVI of the bill of complaint herein, deny that complainant has no plain, speedy or adequate remedy at law.

XV.

Said defendants, answering paragraph XXVII of the bill of complaint herein, deny that this action is a case in equity arising under the constitution of the United States, or within the jurisdiction of this Honorable Court, or that the issues herein, or any of them, involve federal questions under the Constitution of the United States, or that the poles, wires, apparatus and appliances maintained by the complainant upon or along said York Boulevard, for the uses or purposes aforesaid, are of the value of more than Three Thousand Dollars ($3,000.), or of any other sum in excess of Eight Hundred Dollars ($800.); or that the alleged rights and franchises of complainant to construct, erect, and maintain said poles, wires, apparatus and appliances, upon or along said York Boulevard, are of the value of more than Ten Thousand Dollars ($10,000.), or of any other sum in excess of One Hundred Dollars ($100.); or that the alleged constitutional franchises of complainant to occupy and use the public streets, places and thoroughfares of said City of Los Angeles, and the alleged rights enjoyed and used by complainant thereunder, are of a value exceeding the sum of One Million Five Hundred Thousand Dollars ($1,500,000.); or of a value exceeding Three Hundred Thousand Dollars ($300,000.); or that said ordinance, mentioned in paragraph XVIII of the bill of complaint herein, for or on account of any of the alleged reasons set forth in said bill of complaint, or for any reason at all, is unreasonable, unjust, arbitrary, or confiscatory, or that, if said ordinance is enforced, said complainant will be compelled to conduct its business or operations, or any of them, under the arbitrary or other direction or behest of the defendants, or any of them; or that complainant will be thereby deprived of its rights, privileges, or fran-

chises, or property, without due process of law, or at all; or that said ordinance or said alleged directions given or intended to be given thereunder are, or that either or any of them is, violative of, or prohibited by, the provisions of said 14th amendment of the Constitution of the United States, or, by reason of the provisions of
90 said 14th amendment, or otherwise, or at all, is null or void, or that, by the enforcement of said ordinance the privileges or immunities of complainant herein, or any of them, would be abridged, or the equal protection of the laws denied to said complainant; and said defendants further deny that the matter in controversy in this action exceeds in value or amount, exclusive of interest or costs, the sum of Three Thousand Dollars ($3,000.), or any sum in excess of One Hundred Dollars ($100.).

Wherefore, defendants and each of them pray that the complainant herein take nothing by this action, and that said defendants go hence with their costs; and for such other and further relief as to the court may seem meet in the premises.

ALBERT LEE STEPHENS,
City Attorney.
W. B. MATHEWS,
WM. B. HIMROD,
LEWIS E. WHITEHEAD,
Solicitors for Defendants.

91 STATE OF CALIFORNIA,
County of Los Angeles, ss:

E. F. Scattergood, being first duly sworn, deposes and says: That he is one of the defendants named herein, and that he is an officer of the defendant, The City of Los Angeles, to-wit: Electrical Engineer of the City of Los Angeles; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to such matters, he believes them to be true.

E. F. SCATTERGOOD.

Subscribed and sworn to before me this 10th day of April, 1917.

[SEAL.] EVA H. SHOEMAKER,
Notary Public in and for the County of Los Angeles, State of California.

(Endorsed:) Original No. D-23. U. S. District Court, Southern District of California, Southern Division. In Equity. Los Angeles Gas & Electric Corporation, a corporation, vs. The City of Los Angeles, et al. Answer of defendants to bill of complaint. Received copy of the within Ans. this 9th day of April, 1917. H. C. Beach Attorney for Plaintiff. Albert Lee Stephens, City Attorney Merchants' Trust Bldg., Los Angeles. W. B. Mathews, Special Counsel. Attorney for Defendants. Filed Apr. 10, 1917. Wm. M. Van Dyke, Clerk, by Chas. N. Williams, Deputy Clerk.

In the District Court of the United States for the Southern District of California, Southern Division.

D-23. In Equity.

LOS ANGELES GAS & ELECTRIC CORPORATION, a Corporation, Complainant,

vs.

THE CITY OF LOS ANGELES, a Municipal Corporation, et al., Defendants.

Statement of the Evidence for Record on Appeal.

Come now the defendants and appellants in the above entitled action, and file this, their statement of the evidence had at the hearing of said cause, which in the opinion of said appellants, is essential to the decision of the questions presented by the appeal.

Be it remembered that the above entitled cause came regularly on for trial before the above entitled court on Friday, the 27th day of April, 1917, complainant appearing and being represented by its solicitors, H. C. Beach, Esq., Paul Overton, Esq., and Herbert J. Goudge, Esq., and defendants appearing and being represented by their solicitors, Albert Lee Stephens, City Attorney, W. B. Mathews, Esq., Lewis E. Whitehead, Esq., and Wm. B. Himrod, Esq., and thereupon the following proceedings were had.

It was thereupon stipulated by and between the parties to said cause that the City of Los Angeles is now and has been since November, 1916, supplying electrical energy upon and along poles and wires and other equipment located upon and along York Boulevard for the purpose of lighting the streets, and said City has, 63 for a period of two months last past, been supplying commercial consumers with electrical energy from said wires located on said poles so erected by said City on York Boulevard, a public street within the City of Los Angeles.

It was thereupon stipulated that ordinance No. 36125 N. S. was duly and regularly passed by the Council of the City of Los Angeles on the 6th day of March, 1917, and is in the words and figures as follows, to-wit:

"*Ordinance No.* 36125.

(New Series.)

An Ordinance providing for the removal or relocation of poles and other properties located in Public streets and other public places of the City of Los Angeles, when necessary in order that the municipal electrical street lighting system may be constructed, operated and maintained therein.

Whereas, the public peace, health and safety demand the construction and establishment by The City of Los Angeles of an

electrical system, whereby the public streets and other public places of said city may be lighted, and, to that end, it is necessary that pole and wire lines, street lamps and fixtures, and other incidental appliances, should be installed in the public streets and public places of said city as speedily as may be practicable; and,

Whereas, various persons, firms and corporations are maintaining in the public streets and other public places of said city, poles, anchors, cross arms, wires, street lamps and other fixtures, appliances and structures, and it is necessary in order that sufficient space may be secured for said municipal electrical system in said public streets and public places, and that the work of constructing and establishing the same may be carried on, to provide for the removal or relocation of certain of said poles and other properties so maintained by said persons and corporations.

Therefore:

The Mayor and Council of The City of Los Angeles do ordain as follows:

Section 1. That whenever it shall appear to the Board of Public Works of said City that the removal or relocation of any pole, anchor, cross arm, wire, street lamp, or any other fixture, appliance or structure, owned or controlled by any person, firm or corporation, and located in, upon, over or under any public street or public place of said city, is necessary in order that the Municipal Electrical Street Lighting System of said city, or any part thereof, may be erected, operated or maintained in such public street or public place, then said Board shall give notice in writing to the person, firm or corporation owning or controlling said pole or other property, located as aforesaid, to remove or relocate the same; that such notice shall state the number and location of the poles, anchors, cross arms, wires, street lamps, or other fixtures, appliances or structures, to be removed or relocated, and, when relocation of any such poles, anchors, cross arms, wires, street lamps, or other fixtures, appliances or structures, is required in such notice, then such notice shall designate the location in, upon, over or under any such public street or other public place to which the same shall be removed; and it shall be the duty of such person, firm or corporation to begin, within five (5) days after the giving of such notice, the work of removing or relocating the poles, anchors, cross arms, wires, street lamps, or other fixtures, appliances or structures designated in such notice, and to prosecute such work diligently to completion.

Sec. 2. It shall be unlawful for any person, firm or corporation owning or controlling any pole, anchor, cross arm, wire, street lamp, or any other fixture, appliance or structure located in, upon, over or under any public street or other public place in the City of Los Angeles, to fail or refuse to begin the work of removing or relocating such pole, anchor, cross arm, wire, street lamp, fixture, appliance or structure within five (5) days after receiving notice in writing from the Board of Public Works of said city so to do, as provided in Section 2 of this ordinance.

Sec. 3. It shall be unlawful for any person, firm or corporation owning or controlling any pole, anchor, cross arm, wire, street

lamp, or any other fixture, appliance or structure located in, upon, over or under any public street or other public place in the City of Los Angeles, to neglect or refuse, after (5) days' notice in writing from the Board of Public Works of said City to said person, firm or corporation, as provided in Section 2 of this ordinance, to remove or relocate any such pole, anchor, cross arm, wire, street lamp, fixture, appliance or structure to diligently prosecute such removing or relocating to completion.

Sec. 4. That any person, firm or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punishable by a fine of not more than Five Hundred Dollars ($500) or by imprisonment in the City Jail for a period of not more than six (6) months, or by both such fine and imprisonment.

Each such person, firm or corporation shall be deemed guilty of a separate offense for every day during any portion of which any violation of any provision of this ordinance is committed, continued or permitted by such person, firm or corporation, and shall be punishable therefor as provided by this ordinance.

Sec. 5. That said Board of Public Works, or the Board, commission or officer of said city having in charge the construction and establishment of said municipal electrical system, shall have power to move or relocate any pole, anchor, cross arm, wire, street lamp, or any other fixture, appliance or structure, owned and controlled by any person, firm or corporation in a public street or public place in said city, where such person, firm or corporation shall fail, within five (5) days after receipt of notice, as aforesaid, to begin the work of removing or relocating the same, or shall fail to diligently prosecute such work to completion.

Sec. 6. That said city is now engaged in the construction of an electrical system for lighting the public streets and other public places of said city; that said city has heretofore been compelled to depend on contracts with private utility corporations for furnishing lighting for such public streets and public places and some of said contracts have already expired and all of said contracts will have expired by July 1, 1917, and the completion of said municipal system is necessary in order that said city may be able to provide for lighting its public streets and other public places without interruption; that the removal and relocation of certain poles, anchors, cross arms, wires, street lamps and other fixtures, appliances and structures, owned or controlled by various persons, firms, or corporations and located in said public streets and other public places of said city, are immediately necessary in order that the city may complete and install its said electrical system; therefore, this ordinance is urgently required for the immediate preservation of the public peace, health and safety; and the City Clerk shall certify to its passage by a unanimous vote, and cause the same to be published once in The Los Angeles Daily Journal and thereupon and thereafter it shall take effect and be in force.

I hereby certify that the foregoing ordinance was passed by the Council of the City of Los Angeles by the unanimous vote of all

the members of said Council present, there being not less than seven members present, at its meeting of March 6, 1917.

CHAS. L. WILDE,
City Clerk.

Approved this 7 day of March, 1917.

F. T. WOODMAN,
Mayor."

It was thereupon stipulated that the complaint in the case of Los Angeles Gas and Electric Corporation, Complainant, against The City of Los Angeles, et al., which was an action brought in the Superior Court of the State of California, in and for the County of Los Angeles, and was numbered in said Court No. B-46946, was in the words and figures as follows, to-wit:

"In the Superior Court of the State of California in and for the County of Los Angeles.

LOS ANGELES GAS AND ELECTRIC CORPORATION, a Corporation, Plaintiff,

vs.

CITY OF LOS ANGELES, a Municipal Corporation; FREDERICK T. WOODMAN, Mayor of the City of Los Angeles; M. F. Betkouski, J. S. Conwell, F. C. Langdon, Estelle Lawton Lindsey, Robert T. Brain, W. A. Roberts, Foster C. Wright, Fred C. Wheeler, and John Topham, Members of and Constituting the City Council of the City of Los Angeles; Department of Public Service of the City of Los Angeles, R. F. Del Valle, M. P. Snider, L. H. Valentine, J. W. Kemp, and Byron Erkenbrecher, Members of and Constituting the Board of Public Service Commissioners of the City of Los Angeles, and E. F. Scattergood, Chief Electrical Engineer of the Bureau of Power and Light of the City of Los Angeles, Defendants.

Complaint for Injunction.

98 Plaintiff above named complains of defendants above named and for cause of action alleges:

I.

That plaintiff now is, and at all times subsequent to the 22nd day of June, 1909, has been a corporation duly organized and existing under and by virtue of the laws of the State of California, and during all of said time has had, and does now have, its office and principal place of business in the City of Los Angeles, County of Los Angeles, State of California.

II.

That the City of Los Angeles, one of the defendants above named, s now, and at all times hereinafter mentioned was, a municipal orporation duly incorporated, organized and existing under and by irtue of a Charter duly and regularly adopted, approved and estab-shed under and pursuant to section 8, article XI of the Constitu-ion of the State of California, and situate in the County of Los ngeles, State of California.

III.

That defendants above named, M. F. Betkouski, J. S. Conwell, . C. Langdon, Estelle Lawton Lindsey, Robert T. Brain, W. A. oberts, Foster C. Wright, Fred C. Wheeler and John Topham are ow, and ever since the 5th day of July, 1915, have been, duly ected, qualified and acting members of the City Council of the ity of Los Angeles, and as such constitute and are the City Council f said City of Los Angeles and the legislative authority thereof.

IV.

That defendant above named, Frederick T. Woodman, is now, d ever since the 5th day of September, 1916, has been, Mayor of e City of Los Angeles.

V.

That defendant the Department of Public Service is, and at all times hereinafter mentioned has been, a department of the City government of the City of Los Angeles; and that e following named defendants are now, and at all times herein-er mentioned have been, members of and constitute the Board Public Service Commissioners of the City of Los Angeles, to-wit: F. del Valle, M. P. Snider, L. H. Valentine, J. W. Kemp and ron Erkenbrecher, which said Board of Public Service Commis-ners has now, and at all times hereinafter mentioned had, cont-ol, ection, management and operation of the municipal electric wer and distribution system of said City of Los Angeles, which d City owns, or claims to own, a generating and distributing system the purpose of generating, distributing and selling to the inhabit-s of the City of Los Angeles electrical energy for light and power poses.

VI.

That defendant above named, E. F. Scattergood, is now, and at all es hereinafter mentioned has been, the duly appointed, qualified acting Chief Electrical Engineer of the Power Bureau of the of Los Angeles.

VII.

That plaintiff is empowered by its articles of incorporation to en
gage in the business of generating electric energy and the distribu
tion and furnishing of the same in the City of Los Angeles, and eve
since the first day of August, 1909, plaintiff has been, and is now
engaged in furnishing and distributing electric energy to consumer
in the City of Los Angeles; and long prior to the 10th day o
October, 1911, plaintiff and its predecessors in interest had, under
and pursuant to the provisions of section 19, article XI of the
Constitution of the State of California, as said section existed prior
to the amendment thereof on October 10, 1911, lawfully
100 erected and constructed poles, wires, conduits and other
electrical appliances and edifices in the streets and other
public places of the City of Los Angeles for the purpose of supply-
ing and furnishing electrical energy to said City and the inhabitants
thereof, and under and pursuant to the provisions of the Constitu-
tion of the State of California plaintiff now owns, possesses and
enjoys the right, privilege and franchise of using the public streets
and thoroughfares of said City for the purpose of erecting and
constructing poles, wires, conduits and other electric appliances
thereupon or thereunder so far as may be necessary for introducing
into and supplying said City of Los Angeles and its inhabitants with
electric energy.

VIII.

That on or about the 29th day of February, 1916, plaintiff
corporation and defendant, the City of Los Angeles, duly entered
into and executed a contract by the terms of which plaintiff corpora-
tion became obligated to furnish, supply, install and maintain cer-
tain electric street lights with which to light certain public streets
and alleys of the City of Los Angeles, as hereinafter more specifically
alleged, and the electric energy to supply and operate said lights.

IX.

That under and by virtue of the franchise hereinbefore mentioned,
and in order to operate and maintain said street lights described in
paragraph VIII herein, and in order to supply the inhabitants of
said City of Los Angeles with light and power, plaintiff corpora-
tion constructed and purchased a system of poles, wires and conduits
by which to carry, transmit and convey electric energy with which
to supply said City with street lights and the inhabitants thereof with
light and power; that the major portion of said system is the sole
property of plaintiff corporation, while other portions thereof con-
sisting of certain poles used to support the wires transmitting
101 and conveying said electric energy, are owned, controlled and
maintained by plaintiff corporation jointly with one or more
other public service corporations doing business within said City of

Los Angeles; that in erecting and constructing said poles, and wires used for the purpose of conveying said electrical energy plaintiff has at all times used due care in the premises, so erecting and constructing said poles, wires and other apparatus as to be of no danger to its employees or to the life or property of other persons or corporations, and has erected and constructed said poles, wires and other apparatus so that the same would bear all strains and stresses to which it could be reasonably anticipated they would be subjected.

X.

That for a long time past, to-wit: for a period of more than one year, defendant corporation, its officers, agents, servants and employees, have wilfully, designedly and knowingly, without the permission of plaintiff or the permission of other corporations with whom plaintiff now jointly owns and controls certain poles and equipment hereinafter specified, without legal or other authority, have committed numerous and divers acts hereinafter more specifically referred to interfering with, taking and destroying the property and structures owned by plaintiff, or in which plaintiff was a joint owner with another public utility corporation.

XI.

That in order to supply said City with street lights and to comply with the obligations of said contract plaintiff has attached wires necessary therefor to certain poles constructed along and upon Pyrites Street, a public street located within the City of Los Angeles, and which poles are maintained under and by virtue of the franchise of plaintiff described in paragraph VII hereof; that among said poles so located on said Pyrites Street plaintiff maintains a pole
102 for the purposes aforesaid at or about the intersection of said Pyrites Street with Amethyst Street, a public street within the said City of Los Angeles; that on or about the 13th day of January, 1917, defendant corporation, acting through its duly authorized officers, agents, servants or employees, and without the knowledge, consent or permission of plaintiff, interfered with said pole so maintained by plaintiff; that said interference consisted in this: that defendant corporation acting through its duly authorized officers, agents, servants or employees attached to said pole so maintained by plaintiff at the said intersection of Pyrites and Amethyst Streets a guy wire to support and maintain a pole constructed and maintained by defendant corporation on the opposite side of said Pyrites Street; that said guy wire subjects said pole to undue stress and strain.

XII.

That in order to supply said City with street lights and to comply with the obligations of said contract plaintiff has attached wires necessary therefor to certain poles constructed along and upon

Mozart Street, a public street located within the City of Los Angeles, which poles are maintained under and by virtue of the franchise of plaintiff described in paragraph VII hereof; that among said poles so located and constructed on said Mozart Street is a pole located a short distance westerly from the intersection of Mozart Street with Avenue 20, a public street located within the City of Los Angeles, which said pole is numbered 828-*g*; that on or about the 8th day of January, 1917, defendant corporation, acting through its duly authorized officers, agents, servants or employees, without the knowledge, consent or permission of plaintiff, interfered with said pole, the property of plaintiff, by attaching to said pole a guy wire leading from a pole situated at or near the intersection of said Mozart
103 Street with said Avenue 20, and maintained and constructed by said defendant corporation, and numbered 5579-*m*, thereby subjecting said pole numbered 828-*g*, the property of plaintiff, to undue stress and strain.

XIII.

That in order to supply said City with street lights and to comply with the obligations of said contract plaintiff corporation has attached wires necessary therefore to certain poles constructed along and upon Avenue 25, a public street located within the City of Los Angeles, near its intersection with Moffit Alley, another public street or alley located within the City of Los Angeles, and which poles are maintained under and by virtue of that franchise of plaintiff described in paragraph VII hereof; that among said poles so located on said Avenue 25 near the point aforesaid is a pole located on the northerly line of said Avenue 25 about midway between the intersection of said Avenue 25 with said Moffitt Alley and Pasadena Avenue, another public street located within the City of Los Angeles, and which said pole is numbered 749-*g*; that on or about the 8th day of January, 1917, defendant corporation, acting through its duly authorized officers, agents, servants or employees, without the consent, knowledge or permission of plaintiff, unlawfully interfered with said pole, the property of plaintiff, said interference consisting in this: "that said defendant acting through its duly authorized officers, agents, servants or employees removed the pole top fixture from said pole belonging to plaintiff, No. 749-*g* and located as aforesaid, and tied the arc light supported by said pole and operated by plaintiff in pursuance of its contract with said defendant to the cross arm of said pole, and left said pole top fixture hanging to the cross arm of plaintiff's said pole No. 749-*g*, thereby unlawfully interferring with the property and structures of plaintiff and leaving said pole, cross arm and wires attached to said pole in a condition dangerous to life, limb and property."

104 XIV.

That in order to supply said City with street lights and to comply with the obligations of said contract plaintiff corporation has attached wires necessary therefor to certain poles constructed along and

upon Manitou Avenue, a public street located within the City of Los Angeles, which poles are maintained under and by virtue of the franchise of plaintiff corporation described in paragraph VII hereof; that among said poles so located and constructed on said Manitou Avenue is a pole located and constructed along the northerly line of said Manitou Avenue a short distance easterly from the intersection of said Manitou Avenue with Avenue 21, another public street located within the City of Los Angeles, and which pole is numbered 633-*g*; that on or about the 8th day of January, 1917, defendant corporation, acting through its duly authorized officers, agents, servants or employees, and without the knowledge, consent or permission of plaintiff interfered with said pole, the property of plaintiff; that said interference consisted in this: "that said defendant acting through its duly authorized officers, agents, servants or employees placed upon said pole belonging to plaintiff, hereinbefore described, a cross arm for the support of wires and other electrical equipment of defendant, thereby subjecting said pole No. 633-*g*, the property of plaintiff, to undue stress and strain and rendering said pole and the equipment already thereon unsafe, insecure and dangerous to life limb and property."

XV.

That in order to supply said City with street lights and to comply with the obligations of said contract plaintiff has attached wires necessary therefor to certain poles constructed along and upon 78th Street, a public street located within the City of Los Angeles, and for the same purposes has attached wires necessary therefor to certain poles constructed along and upon Vermont Avenue, a public street located within the City of Los Angeles, all of which poles are maintained under and by virtue of the franchise of plaintiff described in paragraph VII hereof; that among the poles so located on Vermont Avenue is a pole located on the easterly line of said Vermont Avenue a short distance northerly from the intersection of the easterly line of said Vermont Avenue with the northerly line of said 78th Street, which said pole is numbered 14430-*g*; that on or about the 21st day of December, 1916, defendant corporation, acting through its duly authorized officers, agents, servants or employees, and without the knowledge, consent or permission of plaintiff, wilfully, knowingly and unlawfully interfered with said pole, the property of plaintiff, which said interference consisted in this: that said defendant, acting as aforesaid through its officers, agents, servants or employees, removed the pole of plaintiff from the location as aforesaid and disconnected the wires of plaintiff therefrom and replaced said pole at another and different location from that where it originally stood and in its place erected and constructed a pole owned and operated by defendant corporation; that said pole No. 14430-*g* so originally placed by plaintiff was so placed as to most advantageously form a part and parcel of the distributing system of plaintiff and to enable plaintiff to comply with the terms of the contract hereinbefore mentioned; that by reason of the removal of said pole by

105

defendant the distributing system of plaintiff in that vicinity was thrown out of alignment and said poles and wires were subjected to undue stress and strain, and the same were rendered insecure, unsafe and dangerous to life, limb and property.

XVI.

That in order to supply said City with street lights, and to
106 comply with the obligations of said contract plaintiff has attached wires necessary therefor to certain poles constructed along and upon York Boulevard, a public street located within the City of Los Angeles, which poles are maintained under and by virtue of the franchise of plaintiff corporation described in paragraph VII hereof; that among said poles so located on York Boulevard is a pole numbered 18596-*g*, which is located at or about the southwesterly corner of the intersection of said York Boulevard with Avenue 49, another public street within the City of Los Angeles; that on or about the 29th day of November, 1916, defendant corporation, acting through its duly authorized officers, agents, servants or employees, in the construction of a light and power distributing system owned and operated by said defendant strung upon poles erected by defendant corporation upon the southerly line of said York Boulevard near the intersection of said York Boulevard and said Avenue 49 a transmission wire designed to carry electrical energy of 33,000 volts; that said wire was strung so that it is now unlawfully within approximately two inches of the light arc wire carrying 2,200 volts of electrical energy and which is owned and operated by plaintiff on said pole No. 18596-*g* belonging to plaintiff; that the stringing of said 33,000 volt transmission wire in such close proximity to said arc wire owned and operated by plaintiff is in violation of law and the statutes in such cases made and provided, and is highly dangerous to the property of plaintiff, and the life, limb and property of the public in general.

XVII.

That upon and along said York Boulevard and to comply with the obligations of said contract plaintiff maintains a pole with wire attached thereto for the purposes aforesaid at the southeasterly corner of the intersection of said York Boulevard and Avenue 50,
107 another public street within the City of Los Angeles; that on or about the 29th day of November, 1916, said defendant in constructing and stringing said 33,000 volt transmission line on said York Boulevard tied said 33,000 volt transmission wire and line at or about the intersection of the two streets last above mentioned with a piece of rope, the ends of which rope were tied to the cross arm of plaintiff's pole No. 18597-*g* situate at the southeasterly corner of the two streets last aforesaid; that in negligently and carelessly tying together said 33,000 volt transmission line at the point and upon the pole aforesaid said 33,000 volt transmission wire was brought into proximity with the arc light wire carrying

2200 volts of electrical energy and which is owned and operated by plaintiff and attached to pole No. 18597-*g* at a distance of approximately one inch therefrom; that as hereinbefore stated said 33,000 volt transmission wire is designed to carry such quantities of electricity as are highly dangerous and should not, under the law and the statutes in such cases made and provided, be brought into proximity with other wires and equipment unless a space of many feet intervenes; that in so unlawfully, negligently and carelessly stringing said 33,000 volt transmission line defendant rendered the premises surrounding said pole No. 18597-*g* belonging to plaintiff highly dangerous and unsafe, both to the property and employees of plaintiff and to the life, limb and property of others.

XVIII.

That in order to supply said City with street lights and to comply with the obligations of said contract plaintiff has attached wires necessary therefor to certain poles constructed along and upon said York Boulevard, which poles are, as aforesaid, maintained under and by virtue of the franchise of plaintiff described in paragraph VII hereof; that among said poles so maintained and constructed by plaintiff is a pole, numbered 18599-*g* and located at the southwesterly corner of the intersection of said York Boulevard with Avenue 51, another public street within the City of Los Angeles; that on or about the 29th day of November, 1916, defendant corporation, acting through its duly authorized officers, agents, servants or employees and without the knowledge, consent or permission of plaintiff, so erected, strung and constructed a wire over which it is designed to carry electrical energy of the amount of 33,000 volts; that the same is now bearing and leaning against the pole top fixture on said pole No. 18599-*g* as aforesaid, belonging to plaintiff; that said pole and the equipment thereon are rendered in a highly dangerous and unsafe condition; that said 33,000 volts of electrical energy so designed to be carried on said line or wire constructed by defendant corporation is highly dangerous to life, limb and property and its existence and proximity to the pole top fixture on said pole belonging to plaintiff renders it unsafe, insecure and dangerous to life and limb of plaintiff's employees and the life, limb and property of the public in general and the property of plaintiff.

108

XIX.

That in order to supply said City with street lights and to comply with the obligations of said contract plaintiff has attached wires necessary therefor to a certain pole constructed and erected upon Piedmont Avenue, a public street located within the City of Los Angeles, near the northeasterly corner of the intersection of said Piedmont Avenue and Avenue 59, another public street within the City of Los Angeles, which said pole is maintained under and by virtue of the franchise of plaintiff described in paragraph VII

hereof; that on or about the 10th day of November, 1916,
109 defendant corporation, acting through its duly authorized officers, agents, servants or employees, and without the knowledge, consent or permission of plaintiff, interfered with said pole and the fixtures thereon, the property of plaintiff, in this: that defendant corporation acting, as aforesaid, negligently, knowingly, wilfully and carelessly, removed the pole top fixture from said pole belonging to plaintiff, situate as aforesaid, and hung the street light which was suspended therefrom from the cross arm on another pole located in the vicinity.

XX.

That in order to supply the said City with street lights and to comply with the obligations of said contract plaintiff has attached wires necessary therefor to certain poles constructed upon and along Newland Street, a public street located within the City of Los Angeles, which poles are maintained under and by virtue of the franchise of plaintiff described in paragraph VII hereof; that said poles, being five in number and located on said Newland Street, and extending from street number 261 to street number 355 on said Street, are the joint property of plaintiff and the Pacific Light and Power Corporation, a public service corporation organized and existing under the laws of the State of California; that on or about the 11th day of May, 1916, defendant corporation, acting through its duly authorized officers, agents, servants and employees, and without the knowledge, consent or permission of plaintiff and of said Pacific Light and Power Corporation or of either of said corporations, interfered with said poles, the property of plaintiff and said Pacific Light and Power Corporation; that said interference of said defendant consisted in this: that said defendant, acting through its duly authorized officers, agents, servants and employees, moved a pole
located in front of number 305 Newland Street, which said
110 pole constituted a part of said system, and disconnected the wires of plaintiff from said pole and replaced said pole at another and different location than that in which it originally stood.

XXI.

That in order to supply said City of Los Angeles with electric street lights and the energy necessary to operate and maintain said lights plaintiff purchased, constructed and installed certain poles along Pasadena Avenue, a public street located within the City of Los Angeles, which said poles are operated and maintained under and by virtue of the franchise of plaintiff described in paragraph VII herein; that one of said poles located on said Pasadena Avenue at the intersection of said Pasadena Avenue with Avenue 64, a public street in the City of Los Angeles, is the joint property of plaintiff and Home Telephone and Telegraph Company, a public service corporation organized and existing under the laws of the State of California; that on or about the 11th day of May, 1916, said de-

fendant, acting through its duly authorized officers, agents, servants and employees, without the knowledge, consent or permission of plaintiff, strung, erected, constructed and maintained to said pole, the joint property of plaintiff and Home Telephone and Telegraph Company, and located at the intersection of said Pasadena Avenue and Avenue 64, a wire or wires, the property of said defendant.

XXII.

That the instances above set forth of the interference by defendant corporation with the poles, wires and other equipment of plaintiff are a few instances among many instances of the violation of and interference with the rights of plaintiff; that such interference, and the removal of poles and wires owned by plaintiff, or by plaintiff jointly with other public service corporations, by defendants, or either or any of them, is the taking of plaintiff's property
111 without due process of law and without the payment of compensation therefor; that the same is a denial to plaintiff of the equal protection of the laws and is contrary to and in violation of the provisions of the 14th amendment to the Constitution of the United States, and of the laws of the State of California; that such interference with such poles, such as the removal thereof, or the stringing, erecting, constructing or maintaining of wires or appliances by defendant in unlawful and unsafe proximity to the wires and appliances of plaintiff is highly unsafe and dangerous, not only to the property of plaintiff and the employees of plaintiff, but is highly unsafe and dangerous to the life, limb and property of the public in general in that said wires are highly charged with electric energy, which said electric energy is exceedingly dangerous to life and property.

XXIII.

That heretofore plaintiff has demanded and requested of defendants many times that they cease with such acts of interference as are hereinbefore related and set forth, but defendants have failed, neglected and refused to cease in their pursuit and accomplishment of such acts of interference, and as plaintiff is informed and believes, and upon and according to such information and belief therefore avers, defendant corporation, its officers, agents, servants and employees, threaten to continue such acts of interference with the rights and property of plaintiff, and unless said acts of defendants, and each or any of them, are restrained and prevented by this Court will, if persisted in, cause plaintiff great and irreparable injury and damage.

XXIV.

That plaintiff has no plain, speedy or adequate remedy at law.

Wherefore plaintiff prays that said actions of said City
112 of Los Angeles and the other defendants above enumerated, and each of them, their agents, servants and employees, in

interfering with, moving or displacing the poles and wires of plaintiff, or the poles and wires owned and controlled jointly by plaintiff and other public service corporations, and in stringing, erecting, constructing or maintaining wires or appliances of every kind or description on poles belonging to plaintiff, or to plaintiff jointly with other public service corporations; that the action of defendant corporation, its officers, agents, servants and employees in stringing and allowing to remain in close and unlawful proximity to the wires, poles and equipment of plaintiff 33,000 volt transmission lines or other lines or wires highly charged with electric energy, be adjudged unauthorized by law, and that said City of Los Angeles, and each and all of the other defendants, their agents, servants and employees, be enjoined and restrained from interfering with or moving or displacing said poles or wires or other equipment belonging to plaintiff, or owned jointly by plaintiff and other public service corporations, or from stringing, erecting, constructing or maintaining wires or appliances of any kind or nature upon said poles; that an order issue from this Court directing the defendants, and each of them, and ordering them to show cause at such time and place as this Court may direct why a preliminary injunction should not be granted enjoining the defendants, and each of them, their officers, agents, servants, and employees, from interfering with, or moving, or displacing said poles belonging to plaintiff, or owned jointly by plaintiff and other public service corporations, and enjoining them, and each of them from displacing the wires thereon, or from stringing, erecting, constructing or maintaining any wires or appliances upon said, or any of said poles, and enjoining and restraining said defendant City of Los Angeles,
or any of the other defendants above named, their officers,
113 agents, servants or employees, from stringing, erecting, maintaining or keeping any wire or other equipment charged with electrical energy in unlawful and close proximity to the wires, poles or other structures now in place and erected, constructed and maintained by plaintiff, from all other unwarranted or illegal interference with the property of plaintiff, and for such other and further relief as may seem to this Court just and equitable in the premises.

WM. A. CHENEY,
PAUL OVERTON,
H. C. BEACH,
Attorney- for Plaintiff.

STATE OF CALIFORNIA,
County of Los Angeles, ss:

T. P. McCrea, being first duly sworn on his oath, deposes and says: that he is an officer, to-wit: Secretary, of Los Angeles Gas and Electric Corporation, plaintiff above named, and as such makes this verification for and on behalf of said plaintiff: that he has read the foregoing complaint and knows the contents thereof; that the

same is true except as to such matters as are therein stated on information and belief, and as to those matters he believes it to be true.

T. P. McCREA.

Subscribed and sworn to before me this 25 day of January, 1917.

W. B. BEIRNE,
Notary Public in and for the County of Los Angeles, State of California."

It was thereupon stipulated that the writ of temporary injunction in the cause last above named was in the words and figures as follows, to-wit:

114 "In the Superior Court of the State of California in and for the County of Los Angeles.

LOS ANGELES GAS AND ELECTRIC CORPORATION, a Corporation, Plaintiff,

vs.

CITY OF LOS ANGELES, a Municipal Corporation; FREDERICK T. WOODMAN, Mayor of the City of Los Angeles; M. F. Betkouski, J. S. Conwell, F. C. Langdon, Estelle Lawton Lindsey, Robert T. Brain, W. A. Roberts, Foster C. Wright, Fred C. Wheeler, and John Topham, Members of and Constituting the City Council of the City of Los Angeles; Department of Public Service of the City of Los Angeles, R. F. Del Valle, M. P. Snyder, L. H. Valentine, J. W. Kemp and Byron Erkenbrecher, Members of and Constituting the Board of Public Service Commissioners of the City of Los Angeles, and E. F. Scattergood, Chief Electrical Engineer of the Bureau of Power and Light of the City of Los Angeles, Defendants.

Writ of Temporary Injunction.

Upon reading of the order to show cause made returnable before me in the above entitled action on the 31st day of January, 1917, and thereafter duly continued from time to time, and coming on regularly before me to be heard this 15th day of February, 1917; and the plaintiff appearing and being represented by its counsel, H. J. Beach, Esquire, and the defendants, and each of them, appearing and being represented by their counsel, W. B. Mathews, Esquire, William B. Himrod, Esquire, and Lewis E. Whitehead, Esquire, the Court having read and considered the verified complaint of the plaintiff on file herein and the affidavits filed by plaintiff and defendants, and the Court being fully advised in the premises, and no sufficient cause to the contrary being shown:

It is ordered, adjudged and decreed that on said plaintiff causing to be executed and filed herein a written undertaking, pursuant to the statute and the practice of this Court, to the effect that it will

115 pay the said defendants such damages, not exceeding th
sum of Two Thousand Dollars ($2,000.00) as they may su
tain by reason of the temporary injunction if the Court shall finall
determine the plaintiff is not entitled thereto, that the said defend
ants, and each of them, their officers, agents, servants and employee
are hereby enjoined and restrained during the pendency of the abov
entitled action from interfering with, moving or displacing the pol
and wires of plaintiff, or poles or wires owned or controlled jointl
by plaintiff and other public service corporations; from stringing
erecting, constructing or maintaining wires, appliances or structure
of any kind or description on poles belonging to plaintiff, or upo
poles owned or controlled by plaintiff jointly with other publi
service corporations; from stringing, placing, constructing in clos
unlawful or unsafe proximity to the wires, poles or equipment o
plaintiff 33,000 volt transmission lines, or other lines or wires highl
charged with electrical energy; and from in any other manne
trespassing on or interfering with the property of plaintiff until th
further order of the Court. This order does not relate to or effec
acts already done by defendants, but has relation only to furthe
acts threatened to be done by them.

Done in open court this 16th day of February, 1917.

GRANT JACKSON,
Judge of the Superior Court."

It was thereupon stipulated that the writ of permanent injunction
in the cause last above mentioned was in the words and figures a
follows, to-wit:

"In the Superior Court of the State of California in and for the
County of Los Angeles.

No. B-46946.

116 Los Angeles Gas and Electric Corporation, a Corpora-
tion, Plaintiff,

vs.

City of Los Angeles, a Municipal Corporation, et al., Defendants.

Writ of Injunction.

State of California,
County of Los Angeles, ss:

The People of the State of California to:

The Department of Public Service of the City of Los Angeles and
R. F. Del Valle, M. P. Snyder, L. H. Valentine, J. W. Kemp and
Byron Erkenbrecher, members of and constituting the Board of
Public Service Commissioners of the City of Los Angeles, and E. F.

Scattergood, Chief Electrical Engineer of the Bureau of Power and Light of the City of Los Angeles, Greetings:

Whereas a judgment in the above entitled cause has been rendered by the above entitled Court enjoining and restraining you, and each of you, your agents, servants, attorneys and employees, from in any manner trespassing upon, interfering with, moving or displacing the poles or wires, or either or any of them, owned or controlled wholly or in part by plaintiff; or erecting or placing any pole, cross-arm or other electrical appliance or equipment or attaching any wire or cable to or upon any pole, cross-arm or other electrical appliance or equipment in a fixed position within the distance from any pole, cross-arm, wire or other electrical appliance or equipment owned or controlled wholly or in part by plaintiff, as prescribed by the laws of the State of California and the rules and regulations of the Railroad Commission of said State; and on that certain public
117 street in said City of Los Angeles known and denominated as York Boulevard said defendants, and each of them, their agents, servants and employees, be, and they are hereby, enjoined and restrained from conveying, running or transmitting electric power or energy through the lines and wires heretofore erected and constructed by said City of Los Angeles, its agents, servants or employees, on said York Boulevard until such time as said lines of wire belonging to said City of Los Angeles for the transmission of electrical energy along said York Boulevard are removed from the wires, poles and equipment of Los Angeles Gas and Electric Corporation to such distance as is prescribed by the laws of the State of California and the rules and regulations of the Railroad Commission thereof;

Now, therefore, you the said Department of Public Service of the City of Los Angeles and R. F. del Valle, M. P. Snyder, L. H. Valentine, J. W. Kemp and Byron Erkenbrecher, members of and constituting the Board of Public Service Commissioners of the City of Los Angeles, and E. F. Scattergood, Chief Electrical Engineer of the Bureau of Power and Light of the City of Los Angeles, and each of you, your agents, servants, attorneys and employees, and each and all of them, are hereby commanded and strictly enjoined and restrained from in any manner trespassing upon, interfering with, moving or displacing the poles or wires, or either or any of the-, owned or controlled wholly or in part by plaintiff; or erecting or placing any pole cross-arm or other electrical appliance or equipment or attaching any wire or cable to or upon any pole, cross-arm or other electrical appliance or equipment in a fixed position within the distance from any pole, cross-arm, wire or other electrical appliances or equipment owned or controlled wholly or in part by plaintiff, as prescribed by the laws of the State of California and the
118 rules and regulations of the Railroad Commission of said State; and on that certain public street in said City of Los Angeles known and denominated as York Boulevard you the said defendants, and each of you, your agents, servants and employees, are hereby strictly enjoined and restrained from conveying, running or

transmitting electric power or energy through the lines and wires heretofore erected and constructed by said City of Los Angeles, its agents, servants or employees, on said York Boulevard until such time as said lines of wire belonging to said City of Los Angeles for the transmission of electrical energy along said York Boulevard are removed from the wires, poles and equipment of Los Angeles Gas and Electric Corporation to such distance as is prescribed by the laws of the State of California and the rules and regulations of the Railroad Commission thereof.

Nothing herein contained shall be construed as prohibiting or restraining the City of Los Angeles or its proper boards, officers or agents from carrying into effect any ordinance of said City providing for the removal or relocation of poles, anchors, cross arms, wires, street lamps or other fixtures, appliances or structures owned or controlled by said plaintiff and located in, upon, over or under any public street or other public place of said city.

Given under my hand and seal this 21st day of March, 1917.

[Seal of the Superior Court.]

H. J. LELANDE, *County Clerk,*
By E. A. WICKERSHAM, *Deputy Clerk,*
Clerk of the Superior Court."

Complainant thereupon offered and the Court received in evidence the minutes of the Board of Public Works of the City of Los Angeles as shown in Book No. 76 of the minutes of that body on page 225, reading as follows:

119 "Regular meeting of the Board of Public Works of the City of Los Angeles held Friday, March 23, 1917.

"The Board convened in regular session at 10:00 o'clock a. m. of this day with Messrs. McAleer, O'Brien and President Handley present."

(Omitting immaterial matters.)

"The Chief Electrical Engineer of the Bureau of Power and Light of the Department of Public Service reported as follows:

'In order to give proper clearance to the wires supplying street lighting service along York Boulevard, it will be necessary for this department to ask your Honorable Body to serve notice on the Los Angeles Gas & Electric Corporation, who previously had the street lighting contract along this street to lower their wires in accordance with the terms of Ordinance No. 36,125 N. S., as follows:

'At Armadale Avenue and York Boulevard, remove old pole top fixture from top of their pole No. 18595-G, and lower their wires taking any position they may desire below 41 feet above curb line.

'York Boulevard and Avenue 49, remove old pole top fixture from top of their pole No. 18596-G, and lower their wires, taking any position they may desire below 41 feet above curb line.

'York Boulevard and Avenue 50, remove old pole top fixture from top of their pole No. 18597-G, and lower wires on York Boulevard

lead to 36′ 5″ above top of curb, using clearance arm on City pole No. 4263-M at 41′ level; place buck arm for wires running south on Avenue 50 at 41′ level.

'York Boulevard and Avenue 51, remove old pole top fixture from their pole No. 18599-G, and lower their wires to any position below 40 feet above the curb line.

'York Boulevard and Avenue 52, lower their wires on their pole No. 18600-G to any position below 41 feet above curb line.

'York Boulevard and Avenue 53, lower their line arm on pole No. 18601-G from the 47′ 7″ level to the 32′ level, using the 34′ level for buck arm for wires running north on Avenue 53. All distances based from top of curb.'

"Mr. O'Brien moved that said report be referred to the City Electrician for investigation and report, which motion was adopted all members voting aye."

Complainant thereupon offered and the Court received in evidence the minutes of the Board of Public Works of the City of Los Angeles under date of March 24, 1917, as shown on page 237 of book 76 of the minutes of that body.

(Omitting immaterial matters.)

120 "City Electrician reported as follows:

" 'I beg to return herewith the report from the chief electrical engineer of the Bureau of Power and Light of the Department of Public Service relative to order from the Los Angeles Gas & Electric Corporation to lower its wires on York Boulevard and report as follows:

'I would recommend that your Honorable board notify the Los Angeles Gas & Electric Corp. to make the following changes in the elevation of its wires, cross-arms, etc., on York Boulevard, namely:

'At Armadale avenue and York boulevard, remove old pole top fixture from top of their pole No. 18595-G, and lower their wires taking any position they may desire below 41 feet above curb line.

'York Boulevard and Avenue 49, remove old pole top fixture from top of their pole No. 18596-G, and lower their wires, taking any position they may desire below 41 feet above curb line.

'York Boulevard and Avenue 50, remove old pole top fixture from top of their pole No. 18597-G, and lower wires on York Boulevard lead to 36′ 5″ above top of curb, using clearance arm on city pole No. 4263-M at 41′ level; place buck arm for wires running south on Avenue 50 at 41′ level.

'York Boulevard and Avenue 51, remove old pole top fixture from their pole No. 18599-G, and lower their wires to any position below 40 feet above the curb line.

'York Boulevard and Avenue 52, lower their wires on their pole No. 18600-G to any position below 41 feet above curb line.

'York Boulevard and Avenue 53, lower their line arm on pole No. 18601-G from the 47′ 7″ level to the 32′ level, using the 34′ level for buck arm for wires running north on Avenue 53. All distances based from top of curb.'

"Mr. McAleer moved that the said report be adopted; that the accompanying report of the chief electrical engineer of the Bureau of Power and Light of the Department of Public Service be filed; and that the Los Angeles Gas & Electric Corporation be instructed to make the changes in the elevation of its wires, cross-arms, etc., on York Boulevard, as recommended in the foregoing report.

"Which motion was adopted by the following vote: Ayes: Messrs. McAleer, O'Brien and President Handley (3). Noes: None."

It was thereupon stipulated that pursuant to the action of the Board of Public Works, as set forth in the minutes of that body, the notice of the complainant from said Board of Public Works of the City of Los Angeles was duly served upon complainant in the words and figures and on the date set forth in said bill of complaint.

121 It was thereupon stipulated that a joint pole agreement between complainant and certain other public service corporations as set forth in the bill of complaint, might be admitted in evidence, and that the same is in the words and figures as follows, to-wit:

"This agreement, made and entered into by and between the Pacific Electric Railway Company, a corporation, the Los Angeles Inter-Urban Railway Company, a corporation, the Pacific Light & Power Company a corporation, the Los Angeles Railway Company, a corporation, the Edison Electric Company, a corporation, the Los Angeles Gas & Electric Company, a corporation and the Los Angeles Pacific Railway Company, a corporation all doing business in the City of Los Angeles, County of Los Angeles and State of California, parties to this contract, witnesseth:

That for and in consideration of the mutual benefits to be derived from the covenants and agreements here entered into, and the sums paid by one to another, the several parties hereto, do agree as follows:

General Purpose.

1st. That the present condition of the streets with reference to the poles installed therein shall be improved by reducing the number of poles to the minimum possible number of poles suitable for the safe carrying of wires in such a way as to be of the greatest possible benefit to the citizens of Los Angeles, as well as to the parties hereto, and to begin the construction of the lines at as early a date as possible, and to carry out the work with the greatest possible speed in such a way as to remove the superfluous poles and render the streets now somewhat crowded with poles generally acceptable to the public.

Pole Lines.

2nd. That in general all lighting and power wires will
122 be carried on one side of each street, leaving the other side for the use of the telephone and telegraph companies for their wires. The poles on the one side occupied by the parties hereto

being used for all of their wires as well as for the supporting of the span wires of the railway companies.

Railway Overhead Supports.

3rd. That the poles so set for the purpose of carrying the wires of the parties hereto, will also be arranged generally opposite those on the other side of the streets and at such distances between poles as will render it feasible for the railroad companies to use these poles for the support of their overhead conducting systems in connection with telephone poles of other companies.

Poles.

4th. That the poles shall be of a uniform design, having all parts painted in the same general colors.

Expenses.

5th. That the parties will stand the expense of these poles generally as provided for in the specifications below referring to this matter.

Rights.

6th. That no party shall, by reason of its entering into this agreement, and allowing its own poles to be taken out, forfeit any of its rights to set poles or own poles and that no party hereto shall by any manipulation or transformation of this agreement, be caused to forfeit its rights now existing or to be obtained, to set poles under franchises owned by it.

Progress.

7th. That the parties will from time to time determine, by the action of the General Managers, or other duly authorized officials, to construct new pole lines, or to reconstruct the poles on certain streets, or portions of streets, using the highest and most satisfactory poles existing on the streets, or set entirely new poles, and when the parties have thus determined to do such work, those interested in the new construction or reconstruction shall notify the Managers of all parties to this agreement, advising them of the intended construction, and giving them the opporunity to join in the same, if they so desire, and thereupon the parties entering into the combination shall authorize the work to be done in accordance with this agreement.

123

Committee.

8th. All matters concerning the combination use of the poles, which the Managers have agreed shall be made combination poles as above, shall, as to the manner of occupying and space to be occupied

by the various parties be determined and agreed upon in advance of placing or occupying said poles and as a part of the agreement to enter into the particular combination; all matters arising thereafter which are not provided for in advance shall be referred to a committee and that portion of the committee composed of those members thereof representing the parties occupying those poles concerning which matters necessitating arrangements have arisen, shall decide all such matters.

Formation.

9th. That each party hereto shall appoint one member of this Committee, and these members shall, by a majority vote appoint a neutral member to be known as the secretary of the Committee. It shall be the duty of this secretary to post himself on all matters concerning line work about the City, and bring to the attention of the various members those points where reconstruction or rearrangement of the poles is most necessary, and he shall go over the ground with such members of the Committee and show them what should be done, and these members will then take up the matters with their proper officials for consideration, and if satisfactory, the officials
124 will arrange for the reconstruction of the poles, as stated in section 7 above. Any member of the Committee who cannot be present at a meeting, may send another party to represent him at the meeting by merely giving him a signed letter, stating that he has authority to vote in his place, and this letter shall be filed with the secretary as his authority for accepting the vote of the party bearing the same. This party, in every case, however, to be properly identified. The secretary shall maintain an office in the City of Los Angeles, but shall have no vote at any time. The secretary shall be a man well posted in line construction matters, and shall have no other occupation.

Meetings.

10th. That there shall be a regular meeting of the Committee held at 9 a. m. on the first Tuesday of each month, and that special meetings may be called on three days' notice at any time throughout the month. It shall be the duty of the secretary of this Committee to notify each member of the Committee in writing and in person three days before each meeting, whether regular or special. The personal notification may be made by telephone. The secretary shall preside over these meetings, and bring before the Committee all matters concerning pole lines which have occurred since the last meeting. He shall also mail to each member of the Committee, three days before each meeting, a statement of the business which is to come up at the following meeting, and in this statement, shall in every case be included the routes of all new proposed pole lines or combination pole lines to be built, or entered into by any party hereto, so that each party will be posted and sent its representative to the meeting in the event that it desires space on the poles to be constructed or rearranged.

125

Responsibility.

11th. That any party whose representative shall not be present at a meeting shall be ruled by the actions of the Committee exactly the same as though its representative had been present.

Powers.

12th. That each member of this Committee shall have a vote equal to that of every other member, no matter how many poles the party whom he represents may own in the city, and each vote shall be considered of the same weight and importance.

13th. That in general it is understood that the representatives of parties concerned in a combination ownership of any one pole line, shall decide upon the details of the combination in question, and the other members of the Committee shall not concern themselves in the matter, only those whose interests are at stake entering into the agreement.

14th. That any number of members who may be present at a regular meeting shall comprise a quorum and may act upon any question, a majority of the same being sufficient to make a ruling in any matter which may come before the Committee, due notice, however, having been served in writing three days previous to the meeting.

Notice of Business.

15th. That no point may be brought up at one meeting and passed upon at the same meeting unless all members of the Committee are present, and in the event of any member or members being absent, the matter must be placed on the table until the next meeting following, in order that the regular written statement of the question to be put before the Committee may be sent to each member, giving him an opportunity to be present at the meeting.

126

Term of Agreement.

16th. Any party hereto may withdraw from this agreement by giving six months' notice in writing to each of the other parties hereto, and in the absence of such notice the term of this agreement shall be from the time of signing thereof until a majority of the parties hereto shall by a vote of their officials, conclude to discontinue the arrangement, and in that event the agreement itself ceased; but the ownership in any combination poles having been purchased by various companies, shall stand until the end of the life of the said individual poles, after which the reconstruction following thereupon may be done by the parties under their original franchises in any manner allowed by law at the time, as though this agreement had never existed.

Compensation of Committee.

17th. That each party shall give the services of its member of the Committee without charge. The Committee shall arrange the salary and expenses of the secretary, as conditions and circumstances may point out, and each party shall pay its proportion of this expense. The services of this Secretary may be discontinued at any time, at the discretion of the Committee, if they determine that he is not needed further, and in that case, the Committee shall elect one of its members to act as secretary, such member, however, to continue to have a vote the same as the other members, but to receive no salary.

Intention of Agreement.

18th. That it is the intention of this agreement that all of the terms of the agreement and of the specifications attached hereto, and all of the acts of the Committee duly passed, shall be carried out in accordance with the intent of this agreement, and the specifications attached, and that in the event that a party shall refuse to carry out its proportion of this agreement, or shall refuse to pay bills rendered in accordance with this agreement, and the decisions of the
127 Committee, that it shall be obliged to remove its wires from the poles. It is understood and agreed that this contract shall go into effect and be in operation on and after January 1, 1907.

Specifications.

Combined Use of Existing Pole.

1st. In combination use of existing poles, the combining parties will use the poles of the party having the highest or most satisfactory poles on the side of the street which the combining parties may determine upon.

Pole Specifications.

2nd. No poles will regularly be considered in this agreement which are less than 30′ in length or more than 60′, and each pole shall be rated as a 30, 35, 40, 45, 50, 55 or 60 ft. pole, according to its length, it being rated at an even 5 ft. equal to or next below its actual length. No poles smaller than 8″ tops need be used by the Committee unless they are particularly desirable. Any poles not equal to this specification may be considered if the Committee sees fit. If any line of poles is to be used as a combination pole line, and it is not previously supplied with pole steps, the same must be stepped by the owners as the cost of steps is included in rates mentioned below. These poles if not in good condition regarding the painting, must also be painted by the owners, as directed by the Committee at the expense of the said owners, giving them the standard color, which will indicate that the poles have become com-

bination poles. All poles shall be painted a green color, approved by the Committee, with a black base, extending 5 ft. above the sidewalk. All of the owners of any pole shall stencil their name or initials on the said pole in a single line stencil running horizontally around the pole. This stencil to be black painted on
128 the green part of the pole immediately above the black of the base.

Reconstruction by Owning Parties.

3rd. When a party desires to use poles on one side of any street where poles exist and the said existing poles are not suitable for combination use, then one of the owners of the poles existing on this side of the street may set new poles of a standard size and length sufficient for the combined use of themselves and the parties desiring space on these poles, and said constructing party shall then have the right to the top position of the new poles, unless otherwise ordered by the Committee on account of this position conflicting with other positions held by the same party in or near this locality. Each party shall place its cross arms and wires on the new poles and the constructing party shall remove the old poles of the parties determining to use the combination poles. Each party desiring to use the new poles shall then be charged for its proportion as specified below.

Reconstruction by Newcoming Parties.

4th. Should the party or parties owning the existing poles not desire to construct the new pole line, then one of the parties making the request to enter the combination use of the poles, shall construct a pole line suitable for the combined use of itself and the parties owning the existing poles, and any other parties who may desire to have space on these poles. The party building the same shall have the right to the top position, unless otherwise ordered by the Committee, on account of this position conflicting with other positions held by the same party in or near this locality. Each party shall place its cross-arms and wires on the new poles, and the party doing the construction work shall then remove the old
129 poles and deliver them to their original owners at any point in the city specified by the said owners. The constructing party shall then bill each of the combining parties its proportion of the new poles, as per rates specified below.

New Poles.

5th. In the event of any party intending to construct a new pole line, it shall notify the other members through the Committee as specified above, and shall make room on its new poles for the use of any other parties who express their intention to combine in the use of said poles. It shall have the right to the top position in section 4; the constructing party billing each of the combining parties its proportion of the new poles, as specified below.

Pole Fitting.

6th. The standard size of cross-arms shall be 3¾″ x 4¾″ x 7′ with the pole pins not less than 15″ from the center of the pole, but the length and size of these arms may be varied by the Committee, as desired, provided that a symmetrical appearance of the pole be maintained. Cross-arms to be braced with suitable iron braces. These are also to be maintained the same size and of symmetrical appearance on any one street and shall usually be 26″ long and approximately 1¼″ wide. Cross-arms for regular work shall be spaced about 2′ between centers. The size and spacing of cross-arms may, however, be varied by the Committee to suit any special conditions which may arise, such as high tension lines, railway cross-arms occupying the lowest position and any others at the discretion of the Committee.

Manner of Occupying.

7th. Any party occupying poles shall do so as agreed upon in advance of entering into the combination, and no other parties shall be allowed to enter the combination or use the said
130 poles without the unanimous consent of all the parties then using them under the combination agreement, and any new party shall occupy the said poles in such manner as shall be arranged for by the parties already using the said poles.

Transformers.

8th. Transformers when placed on combination poles shall be placed below all cross-arms with the exception of the cross-arms used by the railway companies, when this arm is placed at a height of approximately 24′ above the sidewalk. The transformers shall be placed on the clear side of the poles, and all wires from the transformers to their cross-arms shall be enclosed in suitable covering, either pipe or wooden molding of a form approved by the Committee.

Valuations.

9th. The valuation on which charges will be based will be at the rate of 35¢ per foot, including all of the sizes mentioned in paragraph #2 from 30′ to 60′ 8″ tops inclusive. Special rates shall be made for poles higher or lower than those above, if they are considered at all. This price is to include shaving, painting, stepping and setting the pole ready for use as directed by the Committee and shall apply to new poles only.

Stubs, 7½″ tops and over, 40¢ per foot.

Existing stubs, 7″ tops and less, shall not be considered as of any value, but must be allowed to remain until naturally decayed or replaced by instruction of the Committee.

All new stubs will be 7½" tops or over.

Dead men, slugs and anchors, $5.00.

All poles set less than three years shall be valued as new poles at the above rates.

All poles set over three years and less than six years shall be valued at the same rate for that portion of the pole extending above the ground, but no value shall be placed on that portion in the ground.

131 All poles set over six years shall be valued at the above figures less 3½¢ per foot for each year or portion of a year, over six years for that portion of the pole extending above the ground, but no value shall be placed on that portion in the ground.

Charges.

10th. The owner or owners of a pole, new or old, which is to be used in combination with more parties, shall be allowed to bill against the said parties, amounts determined by the number of parties using the pole and the valuation of same, and the said amounts shall be due as soon as the parties, by their officials, have agreed to enter the combination, provided the said poles have been put in proper condition as specified in paragraphs above. Space for 1, 2 or 3 cross-arms for regular use, or for two cross-arms to hold one or two high tension three wire circuits, with or without two telephone wires elsewhere on pole, or one railway span, with or without one cross-arm and two or more telephone wires elsewhere on the pole, shall be considered one share. A space for one or two transformers or lighting fixture will be considered as included in one share referred to above. No wires or fixtures whatever may be placed on a pole excepting by shareholders in such poles. The valuation of the stubs, poles, etc., having been determined as per section 9, charges will be made as a fraction of the said valuation as follows:

When a combination is made, each incoming party shall pay the owner or owners that fraction of the valuation represented by the shares to be occupied by it, and the pole is then owned by the occupants thereof in proportion to the number of shares occupied by each. The proceeds so derived by the owners of a pole which was owned by more than one party shall be equally divided between such owners.

132 ## Space to be Occupied by Each Party.

11th. The space and the position to be occupied by each party shall be determined upon in advance of occupation, as provided in paragraph 8 of the Agreement.

Special Expenses.

12th. All maintenance work will be done by one of the shareholders in each pole or line of poles. Improvements in the ap-

pearance of the poles, such as painting or dressing up the poles, shall be done at the request of any shareholder, and the expense of doing the work shall be divided between the shareholders in proportion to the number of shares held by each. The Committee shall determine which shareholder is to do the work, and shall instruct him what is to be done.

The maintenance of poles, such as moving the poles on account of grading or curbing, as ordered by the city, and any general work, including the repainting when the same is necessary, as also of special expenses, incurred for rights of way and replacing of poles, shall be similarly divided.

Responsibility of Railway Companies on Account of Side Strains.

13th. All work necessary to specially brace an existing pole line by adding blocks at the ground line or at the foot of the pole or any other particular arrangement on account of the strains introduced by a railway span, shall be done at the expense of the railway company purchasing shares in the pole, but in cases of constructing a line where curb stones already exist, the same shall be done in such a way as to hold the railway spans without additional expense to the railway company.

Renewing Poles Naturally Decayed.

14th. All poles which shall have been used as long as the Committee shall decide that they are safe, or satisfactory, or as long as the parties owning shares in the same desire to use them, shall
133 be replaced by new poles, the work of constructing a new pole line being done by one of the parties occupying the same, and this party shall bill the other parties the same as for the construction of other new poles, as above. If there is no other determining cause to appoint one party to do the reconstruction work, then the Committee shall order the party occupying the top position on said poles to do the reconstruction work. The party removing the poles and doing the new construction work as above, shall haul the poles so removed at its own expense to a place designated by the Committee, this place being within the City limits of Los Angeles, and here the poles shall be sold at auction, due notice having been given to each party to this contract, at a previous meeting, so that each party may be present and buy the poles if he so desires. The sale shall be conducted by the secretary of the committee, and the proceeds of the sale shall be divided between the owners in proportion to the number of shares owned by each. If, however, the poles are to be used as per section 17, of this specification, such auction sale need not take place.

Placing Poles for Railway Spans.

15th. In any case where an old pole line is being reconstructed or a new pole line constructed on either side of the street, or where a

railway company is to enter a combination use of existing poles, the said combined poles must be placed opposite to the poles across the street, so that the railway company can put their spans on these poles without setting an additional line of poles on the said opposite side of the street.

Ownership of Poles Removed.

16th. When a combination pole line shall be determined upon where several lines of poles exist, the parties owning the poles, excepting those used for combination, shall remove their poles,
134 and they shall be their own property, and each party shall place its wires and cross-arms on the combination pole line without expense to any one else.

Use of Old Poles.

17th. If in the combination use of poles, it is agreed that poles may be used which have previously been in service elsewhere, then the valuation of said poles shall be on the basis of a new pole of the same height, except for that portion which was in the ground; provided, however, that the pole is in other respects equal to a new pole.

In witness whereof, the parties hereto, have on the 10th day of October, 1906, caused their officials, duly authorized, to affix their signatures to these presents.

PACIFIC ELECTRIC RAILWAY COMPANY,
By H. E. HUNTINGTON.

S. H. ANDERSON,
Chief Electrician.

LOS ANGELES INTER-URBAN RAILWAY CO.,
By H. E. HUNTINGTON.

S. H. ANDERSON,
Chief Electrician.

Approved as to form.
W. H. TROWBRIDGE.

PACIFIC LIGHT & POWER COMPANY,
By A. C. BALCH.

E. A. BECK,
Supt. P. L.-P. Co.

LOS ANGELES RAILWAY COMPANY,
By HOWARD E. HUNTINGTON.

C. O. ANDERSON,
Supt. Line Dept.

EDISON ELECTRIC COMPANY,
By JOHN B. MILLER.

B. F. PEARSON, *R. E. C.*

Approved as to matter and terms.
A. L. SELIG.

LOS ANGELES GAS & ELECTRIC COMPANY,
By WM. BAURHYTE, *Second Vice-President.*

E. R. NORTHMORE,
Supt. Elect. Dist.

Approved as to form.
WM. A. CHENEY,
General Counsel.

LOS ANGELES PACIFIC RAILWAY COMPANY.
By T. R. GABE, *Gen'l Manager.*

H. H. LEE.

Approved as to form.
BICKNELL, GIBSON, TRASK, DUNN & CRUTCHER.
DUNN.

135 Complainant thereupon offered, and the Court received in evidence as exhibits "2" and "3" two models purporting to show the location of poles and wires of complainant and the City of Los Angeles and the Department of Public Service thereof at the street intersection of Avenue 50 and York Boulevard, and Avenue 53 and York Boulevard, all public streets within the City of Los Angeles.

It was thereupon stipulated that the models so received in evidence by the Court are substantially correct and that in the testimony of the witnesses for complainant the measurements between the several wires shown on said models were taken from the center of the cross arms and that the measurements taken by the defendants, as shown in the testimony of witnesses for defendants, were taken from the wires themselves and that the relative positions of the poles and wires are exactly the same.

E. R. NORTHMORE, a witness called on behalf of the complainant, being duly sworn, testified as follows:

That he is the Superintendent of electrical distribution for the Los Angeles Gas & Electric Corporation, and has been in such capacity for a period of twelve years; that he is familiar with the model presented in court and marked "Exhibit 2," which purports to be a model of the intersection of York Boulevard and Avenue 53; that York Boulevard runs about east and west, that the pole nearest to the corner on the North and southeast intersection is the pole that belongs to the City of Los Angeles. The yellow silk strings represent the wires belonging to the City of Los Angeles, those on

he top cross-arm being 33,000 volt high tension lines. The other
ellow strings, lower down, represent primary wires and arc wires
or street lighting purposes, and for supplying commercial con-
umers. That the pole directly east of the City pole on the south
ast corner, marked 18601-G, is a pole belonging to the Los Angeles
Gas & Electric Corporation, which pole was set in 1914, the
136 City pole above referred to having been set in the latter part
of the year 1916. The red silk lines attached to the Pole
18601-G represent the wires belonging to the Los Angeles Gas &
Electric Corporation at the time this suit was filed, and at the present
ime, and the white string is the location that the wires would be
laced in if changed in accordance with the order received from the
Board of Public Works of the City.

The green silk lines represent the wires belonging to the Pacific
Light and Power Corporation, and are in the position that they were
t the time the Los Angeles Gas & Electric Corporation received the
rder from the Board of Public Works of said City. The blue silk
ines located on the pole at the north side of the street belonging to
he telephone companies, and other signal companies, telephone
nd fire alarm wires. The upper wires of the plaintiff corporation
re represented as red silk wires, and carry 2400 volts. The voltage
f the wires belonging to the Pacific Light and Power Corporation,
epresented in green, are 2400 volts and 110 volts and 220 volts.
he voltage of the telephone wires designated as being on the north
de of the street, and shown by blue lines, is practically none, being
nly for charging and for ringing the bells.

The voltage of the primary wires of the City of Los Angeles which
re represented by yellow silk strings, is approximately 2400 volts.
he voltage of the arc wires owned by the City is about a 5000 volt
eries.

That at the time the order was received from the Board of Public
Vorks of said City he inspected the property immediately, or within
very few days thereafter; that by dropping the wires of the plain-
ff corporation down, and placing them in the position designated
by the Board of Public Works of said City, it means placing
137 the two wires running north on Avenue 53 less than four
feet from the wires of the Pacific Light and Power Corpora-
on, running east and west, which is a violation of the rules of the
alifornia State Railroad Commission, which provides that where
400 volt wires cross other 2400 volt wires, there shall be not less
an four feet clearance. Also the wires would be about three feet
om the wires of the Pacific Light and Power Corporation. There
ould not be sufficient clearance between the two, which is in con-
ct with the State law and General Order 26 of the Railroad Com-
ission.

"By the Court:

Q. You say less than four feet?

A. Yes, these wires on this lower arm would be less than four feet
om these three wires belonging to Pacific Light & Power Corpora-
n.

Q. How far?
A. About three feet.
Q. Three feet. Now, all right, what other poles? You state it a violation of the State law.
A. That is the State law. The two white wires running north Avenue 53 would be less than four feet from the three wires of t Pacific Light & Power Corp., the three low tension wires running e and west on York Boulevard.
Q. Both of them carrying 2,400 volts?
A. Yes.

By Mr. Beach:

Q. Now, Mr. Northmore, at what height of the cross arm, assumi it was lowered to the point which is required by the order of t Board of Public Works, at what height is the cross arm?
A. The cross arm is 34 feet 6 inches from the ground.

By the Court:

Q. Now, what cross arm are you talking about?
A. This buck arm, as we call it.
Q. The cross arm carrying the white wires.
A. That is the location it would be in if placed in accordance wi the order of the City.

By Mr. Beach:

Q. Now, Mr. Northmore, would the placing of that pole, assumi that lowest position is required in that order, have any effect up the rest of the pole: What I want to convey to you, or ask you, this: Would you lose any part of the pole which you have there?
A. We would lose the top, over ten feet of the pole. The po from here to the top we would have absolutely lost by dropping dow We can't use it at all, or we won't be able to bring our lights fu nished on this line at all on account of violating the State law b crossing over these wires.
Q. Assuming you wanted to run a line in on Avenue 53, or a suming you wanted to run another cross arm along on York Boul vard in either direction, assuming you wanted to put another cros arm on that pole for future business which may arise, is there an space left there after you move to that point? Is there any avai able space left to you on that pole whereby you could secure th proper clearances which are necessary, as required by the law
138 of the State of California, which I will introduce and call t your Honor's attention later?
A. No, there is not.

By Mr. Beach:

Q. Assume now, Mr. Northmore, such a construction of running your lines north or south, or east or west, after you have assume the position shown by the wires in white on pole No. 18601-G, ha would you run any more lines?

A. To run any more wires, it would be necessary to put another cross arm on. For instance, if we wanted to run low tension wires and secondary wires, to turn north or south, we have to put our cross arm down so as to give a legal clearance for the wires crossing, going east and west. The secondary wires would have to be four feet from the primary wires. That means they would have to come down four feet from the white wires running *east* and west, and also they will have to cross over the wires belonging to the Pacific Light & Power Corporation, cross over their primaries four feet. Consequently, we would have to have eight feet clearance to get a back arm on that corner, which is, in practice, to run our secondary wires any way from any distributing folds."

Secondary wires are for residence lighting, and for power and lighting, and they are wires that come from a transformer.

"Q. Now, what would be the reason you couldn't construct any further lines north of Avenue 53? Is there any further reason?

—. That there would not be room for another line four feet below this present arm to carry wires and give proper clearance over the wires belonging to the telephone and power lines, allowing for the usual sag in the strands. The cross arm of the Pacific Light and Power Company is approximately thirty feet from the surface of the ground, and we would have to go four feet below that, which would make us twenty-six feet from the ground, and the Railroad Commission's rules require that a primary shall not cross a street railway at less than twenty-eight feet, and allowing for a sag in our line, we would be probably twenty-five feet above the ground. It would be in violation of General Order 26 of the Railroad Commission. The sag is caused by the stretching of the copper wires, a sag of a foot and a half is usually allowed in every hundred feet of copper wire. I don't know what the State law is in regard to the distance above
139 the ground for primary wire to cross a street railway. The distance between the red silk string, representing the plaintiff corporation's wires, and the green silk string, representing the Pacific Light and Power Corporation's wires, at the point of intersection, is just four feet.

Q. Well, then, it is as close now as could be under the rules and regulations you have already referred to?

A. Yes, sir."

That I am familiar with the installation of the plaintiff corporation's wires when they were put up originally, and the reason for using the red silk strings, representing the wires of the Los Angeles Gas & Electric Corporation in the center, from east to west, was that the line of plaintiff corporation, further down, is placed on the fifty-foot poles, and that when the line was built through, and we arrived at where our fifty-foot line stopped, we bought an interest in the poles belonging to the Los Angeles Railway, or the Pacific Light and Power Corporation. Those poles were along York Boulevard at that time, and we utilized them for the present. On the corner we set a new pole, the same height as our poles further back, so as to get them

necessary clearances for crossings, and providing for the use of the same poles by the other companies who are on the same poles farther down the line, and when we set in poles on the corner, they were set high enough to provide for railroad clearances. I had supervision of the erection of this line of poles on York Boulevard when they were originally erected and constructed. When this line was erected here, this territory had just been taken into the City. Before that time there was a line of thirty-five and forty foot poles belonging partly to the Pacific Light and Power Corporation, and partly to the Los Angeles Railway Company on York Boulevard. The City
140 annexed this territory west of Avenue 57 in about 1912 or 1913, Avenue 57 lying to the east of the point of intersection represented on plaintiff's exhibit 2. After this territory was taken into the City, we got a contract from the City for furnishing the lights in this district, and it was at the same time we got the lighting contract that we extended our wires along these poles, at the same time erecting these tall poles which appear to be on the corner, and referring to pole No. 18601-G. We placed the high poles at the corner to get the proper clearance across the streets for our lines, and for our future business. I set the poles high enough to give room for my two or three cross arms, and to take care of future construction; also to leave room for the other company who had purchased an interest in our poles, farther up York Boulevard. It was necessary to have that level to provide a crossing for the companies that were on the poles. In constructing lines on these main streets, I always provide for commercial lights, and run the lines so that they can be changed over to commercial lines for supplying customers at any time we should lose our lighting contract. I, for instance, ran the arc string in two wires, one wire up the street, and back down the street on the same pole, so as to give me two wires to use for commercial lighting when we lost our contract. We had a contract with the City for street lights along this street, and if at any time we lost that contract, we could use those lines for commercial work. I could have run one wire up the street, but always ran the two wires so I could use those two wires to supply customers later on. I plan for the future for our other business, which in 95% of our cases has followed the street lighting lines. We are supplying customers upon that line from our wires on York Boulevard. I do not know how many customers we have in the neighborhood of York Boulevard,
141 but we have several; I know we are supplying one customer from that pole up there. We have been supplying commercial consumers through the wires along York Boulevard since January, 1917. The height of our pole at the Southeast intersection is 50 feet above the sidewalk; the height of the City's pole is 53 feet above the sidewalk. There is no mechanical reason why the order of the City should not be complied with, except that we would not have any more room to put any additional wires on the poles, or to take care of distributing systems. The change, as ordered by the City, would put our wires closer to other companies', and make it more expensive for us to maintain our wires on account of house-movers, and trimming trees, and this being a bungalow territory, it is hard

to get proper clearance in supplying customers from low poles. You can't get proper clearance across the street.

"Q. You mean the angle from your pole would be so low you can't get the clearance you would if you were stringing a wire from up above?

A. That is the idea.

By the Court:

Q. Your pole down there at the extreme easterly end of your map there would indicate that you would have to take that same angle?

A. Before we went to supplying customers from there we changed that to a 50-foot pole, the same as we have on the further street back there. Several of the poles have been changed in the last three or four years simply because we could not handle the business from that place. When we first went in on that street we went in on short poles. We bought an interest in these poles. And further back we had originally poles in there, but as the business grew the Pacific Light & Power Corporation went in with us in some poles and set high poles, and gave us an interest so that we could get clearance. When I set this pole the idea was to get our same level further back. At that time I only advocated setting one pole and I set it on a level with our line further down.

By Mr. Beach:

Q. Mr. Northmore, what would it cost the Los Angeles Gas & Electric Corporation to make that change which is required on that pole? I will ask you, by the way, is that a simple change to make?

A. That is very simple.

Q. That is, the mechanical part of it is a simple proposition?

A. I would estimate, I should say, ten dollars to do that job, on this particular pole.

Q. Now why, if you can explain to me, if that is a fact, is the top position on a pole, or the top position of the wire any more advantageous than a lower position?

42 A. It gets you out of the trees, for one thing, which is a great saving to the company, and also keeps you away from the other companies stringing wires or working, workmen getting lines across yours. If you are above them, you have the best position and your maintenance is less. You don't have the wires burned down, or tree trimming to do.

Q. Is it not safer for your employees?

A. It is safer for them because there is less trouble getting into other stuff.

By the Court:

Q. Is there danger in a 2400 volt wire?

A. They only use 1600 volts in New York."

The dividing line between low tension and high tension wires is 600 volts, the State law makes that distinction, and that is supposed

to represent the line of demarcation between dangerous and non-dangerous wires.

It was thereupon admitted by defendants that Mr. Northmore was fully qualified to testify as an electrician.

There is no reason from a construction, or mechanical standpoint, why the City of Los Angeles should not have installed a pole ten feet higher, and if they had done so, they would have cleared the wires of the plaintiff corporation. The extra ten feet would cost the City about $4.50.

143 Mr. NORTHMORE testified as follows upon cross examination:

That when he built the lines of the plaintiff corporation, represented by the red silk strings, he used, as a portion of the system the lower poles, and which have been designated as lower poles on the model marked "Exhibit 2," and being to the east and west of the pole numbered 18601-G. To the east there are fifty-foot poles, with the exception of two poles designated as lower poles. To the west the next six poles are 35 feet high, and we have another 50 foot pole on the next corner; in the next block, the same condition exists; the next four or five poles are those heights; and the next pole, at the corner, is another 50 foot pole, and there are some more in the same condition, several blocks, about six blocks, using high poles on the intersections, and low poles between.

"A. I might explain to you that the joint pole committee in this town have a good deal to do with the laying out and extension of poles, and when this line was originally set along here, that 35 and 40-foot line, the Railway notified the committee they were going to set them, and wanted to know if we wanted to buy an interest in those poles. We told them we did not want an interest, because they were outside of the city. When this territory was taken into the city, we went and used the existing poles as much as we could, and set higher poles on the corner, figuring as these others wore out we would fill in with the higher poles."

"Q. Now, Mr. Northmore, isn't it true when you constructed this line some three or four years ago—I forgot which it was that you stated—that you constructed this line for the primary and sole purpose to light the street along York Boulevard?

A. No, sir. I do not construct any line that way. I always lay it out to provide for future commercial business. Arc lines go first, and we follow them with the commercial lines. At the time we constructed the line we constructed it for the purpose of lighting the street, but not for the sole purpose of lighting the street. It is not true that at the time we constructed this line that lighting the streets was the only purpose for which the line was to be used. Any line laid out in several years has always been in contemplation of using it for other purposes. At the time this line was constructed street lighting was not the sole purpose for which it was to be used."

We did not have any commercial service on that line at the time it was constructed, and did not have any until January, 1917. Since

we lost the city contract, we immediately energized it into commercial service, as we are doing on all our other arc lines.
144 The only service we gave off the line up until January, 1917, was street lighting service. We did not place the 50 foot poles at the corners because we were ordered to do so by the Board of Public Works. We were simply ordered to put a light at the intersection, and no height was specified. I haven't the contract with me, and I don't know whether the plaintiff corporation was ordered by the Board of Public Works to place a pole top fixture at that intersection for the purpose of lighting those streets, but I think it simply said to install a light at the street and at the corner. I am not positive; I would have to go back over and check the order, but even if they did, they did not tell us the height. If it was only street lighting, I would put in a 40 foot pole.

The neighborhood is fairly well built up, building rather rapidly, consisting of residences, and along York Boulevard some businesses are developing rather rapidly, and a number of stores being constructed. It is what we call a semi-business street. I do not know how long it has been built up in that condition. I did not not pay very much attention to it before 1914, but at that time it was built up, but not as it is now—it is building up rather rapidly. At the time we built the line on York Boulevard in 1914, it was a pretty well settled community, but not so well settled as it is now. About half the street was not subdivided yet. I do not remember exactly what the condition with reference to building and improvements was in relation to York Boulevard, except that it was just an ordinary residence street, with a few stores. It is a new street, and will ultimately develop into what we call a semi-business street, consisting of businesses and residences. At the time the line was constructed along York Boulevard there were quite a few stores and residences along the street, but I do not know just how many. We had
145 street lighting contracts covering other streets immediately adjacent to York Boulevard.

"Q. Now, Mr. Northmore, did you have street lighting contracts on any other streets out in that neighborhood?

A. Yes sir.

Q. And did you have lines constructed for that purpose?

A. For that purpose, and for other purposes, too, yes.

Q. When did you construct those lines for the purpose of street lighting?

A. I don't know what street you refer to. We have been constructing poles for the last 20 years for street lighting. I have had charge of them for 12 years. I don't know what street you are talking about.

Q. I think the question is perfectly plain. I asked you about that particular neighborhood. Have you had street lighting contracts for the purpose of lighting the streets?

A. Yes, in that city, yes. We have had all over the city.

The Court: He is asking about that neighb*u*hood.

A. I know, but understand, Judge——

The Court: Just answer the question, that is all. Did you have contracts.

A. Yes, sir."

I do not mean the court to understand that I have placed at every street corner or intersection a pole 50 feet high for street lighting purposes. I told you this is a wide street, where street cars were on, and where there is a semi-business street, where we have to provide for crossings in the future, where there are other companies on the line farther down, and where there are combinations in vogue,—that is what I made provision for, and there is not any street in this city where there are street car crossings and where there is a wide street but what we have put in 50 foot poles at the crossings. We have a pole at the intersection of Avenue 50 and Pasadena Avenue for street lighting purposes. It is a suspension light, and if I remember clearly, it is a 50 foot or a 55 foot pole. I am not positive of that fact, but I know we have a 50 foot pole on the east side of Pasadena Avenue, in combination with the Railway Company, and the Pacific Light and Power Company, I don't remember what the height of the pole is at the intersection of Avenue 64 and Pasadena Avenue. I am fairly familiar with that situation, but I can't remember. Pasadena is a broad boulevard, and is occupied by street cars, and has a number of utility corporations running wires along the street. I don't know what the height of the pole is at
146 the corner of Avenue 64 and Pasadena Avenue, but I think, although I am not positive, that it is over 50 feet.

In order to run a feeder to the south from the corner of York Boulevard and Avenue 53, so as to comply with the state law at the present time, considering the wires of the Los Angeles Gas & Electric Corporation in their present position, all I would need to do is to stick a pole over the present pole, as we are on top now, and have plenty of clearance. I have ten feet clearance; I can stick a pole at this location, that is about 100 feet south of York Boulevard on Avenue 53, and set it ten feet higher than the present pole, and I would have ten feet clearance on this pole to set two or three cross arms. Having a low position as compared with a high position would not preclude the corporation from running laterals to the north; it would be more expensive, and we could not get another line through there if we wanted to run additional services; we have two lines at the present time.

"Q. Does the service out there warrant at this time, or for any time in the future, a greater amount of wires than the two wires?

Mr. Goudge: We object to that, if the court please, as incompetent, irrelevant and immaterial, and asking the witness to prophesy, and a double question.

Mr. Whitehead: I will withdraw the question. I said at the present time.

Mr. Goudge: I know, but you also said in the future.

Mr. Whitehead: I will withdraw the latter part of the question, if the court please, and let the present time stand. That is what I wanted, anyway.

The Witness: Will you read the question, please?

The Court: Well, would it not be improper to include in the question such reasonable provision as is usually indulged in by the public service corporations. If you do not ask it, the court will. You might as well do it now.

Mr. Whitehead: Very well, the question stands.

The Witness: Will you read the question, please?

147 (Question read.)

The Court: For such reasonable time in the future as you ordinarily provide for, whatever that time may be; I don't know.

A. Yes sir; it warrants more space and more wires than these two wires.

Q. Now, does the commercial service that you are getting from those lines at the present time warrant any more wires?

A. Yes sir, it does.

Q. At the present time?

A. Well, I don't know that I can say at the present time, or not. It will be in the near future. We could not supply power until we got more wires there; we could not supply any three phase until we got more wires there, and we could not supply service from this pole.

The Court: When you said 'this pole' what do you mean? I will forget it in a minute.

A. The pole at the southeast corner. We could not supply customers from this pole without we put more wires on the pole, a transformer and more wires."

We could not supply the power until we get the wires there, and we could not supply service from the pole at the southeast corner, as shown on the model known as "Exhibit 2" without we put more wires on the pole and a transformer. It would be necessary to put more cross arms on said pole if we attached secondary wires for the purpose of supplying customers. The wires that supply customers are low tension wires, and they should be four feet from high tension wires, and if we want to put them on a cross arm below there if we were to turn south or north, or either way, we would have to keep our feet from the other wires; by other wires, I mean 2400 volt wires. It is not possible to run a lateral or feeder off the same arm to which the high tension wires are attached with the construction as it is at the present time. If it was only the line arm there we might be able to, but that crowds the line up on the pole. The best construction is to put the low tension wires on one cross arm, four feet below the arm which carries the high tension wires—that is the best and safest construction.

"Q. As I understand you, Mr. Northmore, you stated if you had that low position that you have been ordered to take, that you would be precluded from running additional secondary or feeder wires to the north here, for the reason that in order to do so you would have to go down to a level below the P. L. & P. wires and that the sag would preclude you from going across; is that correct?

148 A. I said if we dropped our arm below the Pacific Light & Power Company's line and carried it across the street, we would be too close to the street railway, and also too close to this telephone line over here; and also make a very poor construction by running our lines through their lines. We would have to carry our line down through there, and up again, which makes an unsafe construction and very dangerous, and not allowed by any company if they can possibly avoid it. We would be running down through them, our wires through them which makes it very unsafe and dangerous.

Mr. Beach: You say the street railway. You mean the line of trolley wire:

A. No, I mean the line itself, the car itself. General Order 26 says we must be 28 feet from the center of the rail to the nearest point, and this rail is only 30 feet, and if we go four feet below that, we cannot get that clearance."

When we are on poles we try to keep the same grade all the time; if we are above a company, we keep above them; we don't go through them and up again. Our level on York Boulevard is 50 feet all the way back where we construct it permanently. The poles are 50 feet. The fact that we used the 35 foot poles on York Boulevard at this point, and within six blocks adjacent thereto, did not constitute a permanent level. Our poles are higher all the way through. There is no room on those poles (35 foot poles) for two companies to make permanent construction.

We can't make construction and supply customers across the street. I don't think the Pacific Light & Power Corporation, owners of the green lines, go across to the north of York Boulevard. I think they are giving commercial service to the north side of York Boulevard from those lines pictured on the model in green but another company could not do it. I am not positive, but I think the Pacific Light & Power Corporation is giving service to the south. I have not checked up to see what they are supplying. I know that the Pacific Light & Power Corporation cannot cross over the boulevard at that level immediately below us. I have not checked the lines to see whether they are giving service along York Boulevard both north and south from those lines or not. I do not know whether they have another line in the alley back there on the north side or not. I should judge they would have to have

149 another line in the alley so as to get across the street. It is true that the Pacific Light and Power Corporation, occupying and using the 35 foot poles are giving commercial service, both to the north and to the south, from said poles, but another company could not do it, and that is true all along York Boulevard. I didn't say that it was impossible to give service from those 35 foot poles; I say it is impracticable; it is poor construction; you can do anything but it is not safe, and is not up to the law. The plaintiff corporation cannot accommodate itself to the order of the city, and make the crossing, considering its ultimate construction, nor for immediate construction, or for immediate purposes. The

moment we make the change we violate the state law. You have given us a positive position, and the minute we go down there we violate General Order No. 26 of the State Railroad Commission. Both the General Law and the State Railroad Commission covers the change in question. If we adopt the lower cross arm to support our wires going north on Avenue 53, and take the level designated by the Board of Public Works, it will throw our wires less than four feet below the low tension wires of the Pacific Light and Power Corporation.

A line arm is an arm that supports wires that go directly through on a straight route. A buck arm is an arm on a pole to make a turn—to turn the wires off at right angles. A buck arm is maintained for the accommodation of the local service, and taking a right angle turn from the main line.

It is not necessary to drop the buck arm four feet below the line arm for immediate purposes, until we get a customer there. The minute we get a customer, we will have to do it. We built our line originally primarily for the purpose of street lighting, but I had in contemplation commercial lighting. I do not know whether or not the business office of the company made any effort at the time of the original construction, to secure commercial lighting. I did not get any orders to connect any consumers up, and I did not install any service to consumers. The first commercial lighting that we installed was immediately after the street lighting was taken away from us, and we used the same wires heretofore used for street lighting to supply the commercial customers. These wires could not be used for commercial lighting, and at the same time for street lighting, the reason being the difference in tension. The wires furnishing street lighting are high voltage, and cannot be run into the houses. We run two or three primaries of 2400 volts, and put in transformers, and set the voltage down to 110 volts, and run that into the house, and then it is safe. We cannot do that with street lighting.

I do not know whether there was anything in the nature of a contractural relation with the Pacific Light and Power Corporation which prevented plaintiff corporation from using commercial lighting along said street while furnishing street lights; all I know is that there was no request for it, and it required an entirely new installation or an additional installation on the same cross arms, or on a cross arm below for commercial lighting, which takes three wires for primary, and either three or four secondary wires, and you run the low tension wire to supply your customers from an arm four feet below.

The yellow strings on the model designated as "Exhibit 2," represent the city's wires, which are now strung under the plaintiff corporation's wires at the south east intersection, within the inhibited four feet limit. At the time the city's wires were strung the plaintiff corporation's wires, designated by red silk strings, had never been used for any other purpose except street lighting, and could not have been used for any other purpose unless the street lighting was cut out. The street lighting was not cut out

151 when the city ran its wires along York Boulevard. It was cut out after the city's lines were erected. I do not know why the plaintiff corporation did not attempt to give commercial service in that neighborhood until after the city's wires were strung out there, and the city commenced commercial service; I have nothing to do with the business policy of the corporation, except in regard to the laying out of lines, and giving the height of poles, and ultimate construction for the future. On any of the street lighting lines that I have built in the last few years, I have always planned for commercial lighting to follow it, because it has in 90 per cent of the cases, followed street lighting. We always plan and arrange to give room for commercial lighting, to follow street lighting, if it is possible to do so. In all the lines that I have erected in the last few years I have placed 50 foot poles at street intersections, practically at every street railway crossing, and where the wires of other public corporations are in a situation similar to the one at this intersection. I do not know whether the wires of plaintiff corporation were strung across a street intersection or railroad track at this particular point when they were originally built.

"Mr. Overton: A The street lighting contract you have referred to several times. Do you remember what the duration of that contract was, what period of time it originally covered?

Mr. Mathews: I think, if counsel knows, we can perhaps stipulate the point.

Mr. Overton: Well, if the court please, I want to develop this fact, and I think perhaps it may be covered by stipulation, that the contract under which the city has for a number of years—or the company has for a number of years been lighting the streets, has been of a very temporary nature, in most instances a year at a time; in some instances as short a period as 15 days, and then again 6 months. Isn't that true?

Mr. Mathews: Well, generally, that is true.

Mr. Overton: And that the company never had any long period contract or definite assurance as to continuity of service as to its electricity for lighting the streets of the city?

Mr. Whitehead: I think in this particular district the contracts were for one year, a period of one year.

Mr. Overton: And in many of those contracts, particularly in later years, it provided the city might discontinue the service upon notice to the company, 30 days' notice.

152 Mr. Whitehead: That is correct, 30 days' notice.

The Court: Do I understand this contract was entered into for a year, with the privilege of discontinuing it on 30 days' notice, this particular contract?

Mr. Whitehead: No, that was only the last contract.

The Court: We don't care anything about that.

Mr. Whitehead: At the time the lights were installed, that is not correct.

Mr. Mathews: As I understand it, if your Honor please, the contract which was in force at the time the city's lines, the yellow lines were built, by its terms expired at the end of the year 1916.

Mr. Overton: I think that is correct, and that that contract contained a provision that the city might terminate any or all of the circuits on which the street lighting service was performed upon 30 days' notice.

Mr. Mathews: At an earlier period, upon 30 days' notice.

Mr. Overton: And that the contract which was subsequently entered into, perhaps that is not material. It was discontinued before the first of this year. The point I wish to make, your Honor, in connection with that, is this, at the time the company erected its lines on that street for the purpose of lighting the streets, it had merely a temporary contract, a contract not to exceed one year, and it always was faced with the proposition that that contract might be ended, and its construction there would have to be devoted to some other purpose, or there would be a great loss.

Mr. Whitehead: Now, if the court please, we do not——

Mr. Mathews: You don't put that forward as explaining why, with that uncertainty as to municipal street lighting, you did not provide for or seek or take any commercial loads on those lines?

Mr. Overton: I made that merely in an argumentative way, to show that the company would perhaps not have gone to this expense of constructing its poles and wires along the street under merely a one year contract, and the reason that impelled it to do that was that those lines might, after the service was discontinued of lighting the street, be utilized for other purposes. Otherwise it could not have afforded to light the city at the rate under the contract.

The Court: That is the reason why I inquired what the contract was at the time these poles were originally planted.

Mr. Beach: I think it was a one-year contract.

The Court: At that time.

Mr. Beach: Yes.

Mr. Whitehead: No, we can't stipulate to that. The city electrician just informs me that at the time—I beg the Court's pardon. Your Honor is correct.

The Court: At the time the poles were origonally installed.

Mr. Beach: Yes."

Redirect Examination of E. R. Northmore.

The same situation prevails in reverence to the model filed as plaintiff corporation's "Exhibit 3," and purporting to show the intersection of Avenue 50 and York Boulevard as to the colors of the threads representing the wires of the different companies or corporations at said intersection. The red silk string represents the present location of the plaintiff corporation's wires, and the white silk string is the position assigned to the plaintiff corporation by order of the Board of Public Works of said city. The pole of the plaintiff corporation is designated as No. 18597-G, and located on the southeast corner of the intersection represented on said exhibit. If the wires of the plaintiff corporation are dropped to the position assigned to them by the Board of Public Works of said city, it places our wires within one foot of the Pacific Light and Power

Company's primary and secondary wires, which are shown by the green silk strings on said model, which is a direct violation of the state law and the Railroad Commission rulings. That would be true at the time I made the measurements, which was immediately after I received the order. At the present time the Los Angeles Gas and Electric Corporation's lines are attached to an arm on the first pole east of Avenue 50 and York Boulevard, which pole is owned by the city, our primaries being attached by employees of the city to the sidewalk side of the cross arm. Prior to the placing of the wires by the employees of the city on the sidewalk side they were on the street side, in a direct line from our poles to the east, and to the pole 18597-G, which was true of the poles to the west. Our wires have been transferred to the other side of a cross arm, owned by the city, and the lines would cross over to the street side on the next pole belonging to this corporation.

It is stipulated by and between counsel that the wires of the Pacific Light and Power Corporation, designated on plaintiff's "Exhibit 3" by green silk threads, have been removed and lowered a distance of four feet by order of the Board of Public Works.

154 Mr. NORTHMORE, continuing:

"Mr. Whitehead: That is one of the points, Judge. They have set up in their complaint as being impossible to comply with the order, because they claimed to do so they would be in close proximity to the wires of the Pacific Light & Power Corporation.

The Witness: That is a fact.

The Court: If these wires have been removed, that ground of complaint is obviated.

Mr. Whitehead: That is the reason we want that.

The Court: You don't need to worry about that."

"By Mr. Beach:

Q. Explain to the Court, if you can, Mr. Northmore, why the Los Angeles Gas and Electric Corporation by that construction, this zig zag construction, is blocked from any future line arm construction?

A. Well, our arm is now used up with the present two wires. If we want to get three more wires on that cross arm, or any more wires, on account of this figure S construction that the city has placed us in, we are absolutely blocked. We start in with our wires from the cross arm and try to go down to the next one, to the next pole; you cross over lines, and it cannot be done without sorting the lines down.

Q. How about the situation generally on this pole? Is that a dangerous condition, the white lines at or near the crossing of the Pacific Light & Power lines on pole 18597-G; would that create a dangerous condition?

A. Very dangerous. Those wires were within a foot, about a foot from our wires, and those are low tension wires, part of them, which supply residences in that district; and there is a great chance of the lines slackening down or crossing and running a high voltage wire

to a residence or house, if the line is left that way and also violating
e state law and the Railroad Commission orders."

I inspected this intersection at the time we received the notice from
e Board of Public Works, and found the condition as shown by
is model to exist, provided the line was lowered to the point desig-
ated by said order.

"Q. Is there anything, Mr. Northmore, that would block the Los
ngeles Gas & Electric Corporation from putting any more arms on
is pole there?

A. The City *have* provided that we place our wires on pole No.
263-M, on a cross arm provided for by them. That leaves about 6
et from that cross arm, provided by them, down to the next cross
m belonging to the Pacific Light & Power Company; and if we
ant to get more wires through and get the space which we would
ant some time in the future, we would not have room to get in
ere with our cross arms.

A. Is the same situation true, Mr. Northmore, with regard to the
ne of the erection of the Los Angeles Gas & Electric Corporation's
les and the poles of the City of Los Angeles at this intersection,
you testified concerning Avenue 53?

A. Yes, sir.

Q. That is, were the poles of the corporation there first,

A. The same condition prevails there that I testified to on Avenue
."

It was thereupon stipulated that notice of the fact that
5 a notice or order from the Board of Public Works to the Pa-
cific Light & Power Corporation to remove certain wires on
rtain poles upon and along York Boulevard was not brought home
the Los Angeles Gas & Electric Corporation until after the five
ys' notice set forth in the notice of the Board of Public Works to
e Los Angeles Gas & Electric Corporation had expired.

Testimony of Mr. Northmore on Recross-examination.

The line shown on the model designated plaintiff's "Exhibit 3"
a red silk string is a continuation of the same wire as shown on
aintiff's "Exhibit 2" by the same colored string, and was con-
ucted at the same time as the line at Avenue 53 and York Boule-
rd, and for the same purpose of furnishing street lights to York
oulevard, and for future commercial business. The wires, as desig-
ted, have always been used, since the time of its original construc-
n, and up to January, 1917, for street lighting purposes, and for
other business, and could not have been used for any other pur-
se while there were street lights on it, and at the time of the con-
uction of the plaintiff corporation's wires in 1914, they were not,
d could not have been used for any other purpose except that of
eet lighting, and since the time of the original construction, and
to January, 1917, the wires as designated were used for the pur-
se of giving street lighting service, and we have no other wires

there that could be used for the purpose of giving commercial light on these particular poles, in this particular neighborhood. All we had in that particular neighborhood were the poles and cross arms primarily constructed for street lighting purposes, which were so constructed in order to take care of other service, but we have no wires installed for the purpose of giving commercial lighting. There were houses along there that probably would have used lights,
156 and they were using them, I think, from some other company.

Thereupon complainant offered and the court received in evidence a printed copy of what purported to be "General Order No. 26 of the Railroad Commission of the State of California" relating to the distances between wires and other electrical appliances.

It was thereupon stipulated by and between counsel that, subject to any correction, said copy of said General Order No. 26 of said Railroad Commission of the State of California was a true and correct copy and that it was received by the court over the objection of defendants as to its competency, materiality and relevancy and exception allowed defendants to the order of the court admitting the same in evidence.

Said General Order No. 26 of the Railroad Commission of California is in the words and figures as follows, to-wit:

157 General Order No. 26.

Railroad Commission of the State of California.

Regulations Governing Clearances and Construction at Crossings of Railroads, Street Railroads, Telegraph, Telephone, Signal, Trolley and Power Lines with Each Other and with Streets and Public Highways; also Other Overhead and Side Clearances of Railroads, Street Railroads and Wire Lines.

Issued Under Authority of Section 42, Public Utilities Act.

Approved December 14, 1912. Effective January 1, 1913.

It is hereby ordered by the Railroad Commission of the State of California, that the minimum clearances and character of construction hereinafter prescribed for crossings of railroads, street railroads, telegraph, telephone, signal, trolley and power lines with each other and with streets and public highways, and also other overhead and side clearances of railroads, street railroads and wire lines, shall hereafter be observed in this State unless otherwise authorized or directed by this Commission.

Clearances.

L. Railroads and Street Railroads.

a. When railroads, street railroads, streets or public highways cross above railroads, or street railroads which transport or propose to trans-

port standard freight cars, a minimum overhead clearance above the top of rails shall be provided of 22 feet. When such crossings are above street railroads which do not transport or propose to transport standard freight cars, such minimum clearance shall be 19 feet. Provided, that when such street railroads are on streets or public highways, such minimum clearance shall be 14 feet.

b. When telegraph, telephone or signal lines, or power lines of not exceeding 600 volts, cross above railroads or street railroads, a minimum clearance of 25 feet shall be provided, except that the clearance above trolley wires and trolley feeders hereinafter specified (section 1-*d*) shall in all cases be observed.

c. When power lines, other than trolley wires and trolley feeders, which transmit power at from 600 to 15,000 volts, cross above railroads or street railroads, the minimum clearance shall be 28 feet. When such lines transmit power in excess of 15,000 volts, the minimum clearance shall be 34 feet.

NOTE.—Provided that this minimum clearance of 34 feet shall be sufficient that under no circumstances can said lines of voltage higher than 15,000 volts, in case of breakage thereof or otherwise, come in contact with lines of less than 15,000 volts or fall within a distance of 10 feet from the surface of any street or public highway. The clearance of 34 feet is prescribed strictly as a minimum and in all cases when this minimum is not sufficient to comply with the provisions of the act of the legislature entitled, "An act regulating the placing, erection, use and maintenance of electric poles, wires,
158 cables and appliances, and providing the punishment for the violation thereof," approved April 22, 1911, the provisions of this act shall take precedence over this order.

d. When trolley wires or trolley feeders cross above railroads or street railroads, a minimum overhead clearance shall be provided of 22 feet, or otherwise as specified in section 5 of this order.

e. The minimum overhead clearance above the rails of railroads and street railroads which transport or propose to transport standard freight cars, for bridges, tunnels and other overhead structures, shall be 22 feet.

f. The minimum side clearance on each side of the center line of railroads and street railroads, for tunnels and bridges, shall be 7½ feet; for water stations, fuel stations, pole lines and all other side structures, such clearances shall be 8 feet, except in case of double track electric railroads with center pole construction, when such minimum clearance shall be 7½ feet. For narrow gauge railroads and street railroads, the minimum clearance between the side of the widest car and any side structure shall be 30 inches.

g. The minimum clearance between the center line of yard and industrial tracks of standard gauge railroads and street railroads, and the sides—or nearest projection—of buildings and structures, including platforms of height greater than 4 feet above the top of rail, shall be 8½ feet. For platforms 4 feet or less and exceeding 1 foot in height, such minimum clearance shall be 6½ feet. For platforms less than 1 foot in height, such minimum clearance shall be 4½ feet.

For narrow gauge railroads and street railroads, the minimum clearance between the side of the widest car and any structure shall be in the first case given above 42 inches, in the second case 18 inches, and in the third case even with the side of the car.

h. The minimum distance between the center lines of parallel tracks of standard gauge railroads, measured at right angles thereto, shall be 13 feet, except that for house tracks and team tracks such distance may be 11½ feet. For narrow gauge railroads, such distance shall be sufficient to provide a clearance between the sides of the widest cars, in the first case of not less than 36 inches, and in the second case of not less than 18 inches.

i. The minimum distance between the center lines of all tracks of standard gauge street railroads shall be 11½ feet. For narrow gauge street railroads such distance shall be sufficient to provide a clearance between the sides of the widest cars of not less than 28 inches.

j. The minimum distance at crossings between the end of the third rail of electric railroads and the nearest rail of other railroads or street railroads, shall be 8 feet.

2. Streets and Public Highways.

a. Railroads and street railroads which cross above streets and public highways, shall have a minimum overhead clearance above the surface of such streets or highways of 14 feet; and a minimum side clearance between abutments or supports, when one span is used, of 20 feet; and a minimum side clearance, when two or more spans are used, each of 12 feet. When such streets or public highways are occupied by railroads or street railroads, the minimum overhead clearance shall be as specified hereinbefore in section 1-*a*. When the street or public highway is occupied by one track, the mini-
159 mum horizontal distance between abutments or supports shall be 28 feet, and when there is more than one track, an additional distance shall be added, for each track, *or* 13 feet.

b. Telegraph, telephone and signal lines, and power lines of not exceeding 600 volts, which cross above streets or public highways, shall have a minimum overhead clearance above the surface thereof, of 20 feet; power lines of from 600 to 15,000 volts, 24 feet; power lines of above 15,000 volts, 30 feet; and trolley wires and trolley feeders, 19 feet. The minimum clearances for such lines, above railroads and street railroads which occupy streets and public highways, hereinbefore specified in section 1, shall in all cases be observed.

3. Telegraph, Telephone and Signal Lines.

Telegraph, telephone and signal lines, at crossings with other telegraph, telephone or signal lines, shall have a minimum clearance, above or below such lines, of 2 feet, unless suitably supported to prevent contact; above trolley wires or trolley feeders, 4 feet; except for properly protected cables, when 2 feet will be permitted; below power lines of 600 volts or less, 2 feet; below power lines of from 600 to 6,600 volts, 4 feet; below power lines of from 6,600 to 15,000 volts 6 feet, and below power lines of exceeding 15,000 volts, 8 feet, subject to the conditions set out in note to section 1-*c*.

4. Power Lines—Other than Trolley Wires and Trolley Feeders.

a. Power lines, other than trolley wires and trolley feeders, of not exceeding 600 volts, shall have a minimum clearance above rails at crossings with railroads and street railroads of 25 feet; above streets and public highways, 20 feet; above telegraph, telephone and signal lines, 2 feet; above or below other power lines of not exceeding 600 volts, unless suitably supported to prevent contact, 2 feet; above all trolley wires and trolley feeders, 4 feet; above or below power lines of from 600 to 6,600 volts, 4 feet; below other power lines of from 6,600 volts to 15,000 volts, 4 feet; below other power lines of exceeding 15,000 volts, 8 feet, subject to the conditions set out in note to section 1-*c;* and above all buildings and structures, 4 feet.

b. Power lines—other than trolley wires and trolley feeders, of from 600 to 15,000 volts, shall have a minimum clearance above rails at crossings with railroads and street railroads, of 28 feet; above streets and public highways, 24 feet; above telegraph, telephone and signal lines, for power lines of from 600 to 6,600 volts, 4 feet, and for other power lines of not exceeding 600 volts, 4 feet; above or below other power lines of not exceeding 600 volts, 6 feet; above or below other power lines of from 600 to 15,000 volts, 6 feet; below other power lines of exceeding 15,000 volts, 8 feet, subject to the conditions set out in note to section 1-*c;* and above all buildings and structures 6 feet.

c. Power lines of exceeding 15,000 volts shall have a minimum clearance above rails at crossings with railroads and street railroads of 34 feet; above streets and public highways, 30 feet; above telegraph, telephone and signal lines, 8 feet; above other power lines of not exceeding 15,000 volts, 8 feet; above or below other power lines of exceeding 15,000 volts, 8 feet; and above all buildings and structures, 8 feet. All of the provisions of this paragraph *c* are subject
160 to the same conditions set out in note to section 1-*c*.

5. Trolley Wires and Trolley Feeders.

Trolley wires and trolley feeders of railroads, and street railroads which transport or propose to transport standard freight cars, shall have a minimum clearance above their own rails of 22 feet, and of other street railroads 19 feet; provided that at the undergrade crossings mentioned in section 1-*a* maximum clearances of trolley wires above rails shall be secured under the conditions therein specified. Such trolley wires and trolley feeders shall have a minimum clearance at crossings above the rails of other railroads, and street railroads which transport or propose to transport standard freight cars, of 22 feet; and above other street railroads, 19 feet. Trolley wires and trolley feeders shall have minimum clearances below telegraph, telephone, signal and power lines as hereinbefore provided.

Construction of Wire Lines.

6. The minimum clearances for wire lines hereinbefore provided shall have reference to clearances which will obtain under the most unfavorable conditions of temperature and loading. When con-

structing lines commonly called "drops" or "low voltage service wires" the clearances specified above streets and public highways shall apply to the entire distance between the curb lines. "Drops" or "low voltage service wires" may pass above or below other power lines of less than 6,600 volts at the clearances hereinbefore specified.

7. When "buck arm" construction is used, the clearance between the wires of the main and branch line may be the same as the separation of the wires on the arm from which the branch line is taken increasing the specified clearance between line wires (where more than two cross arms are used) by the same amount.

8. When telephone, telegraph and signal lines, and power lines of less than 15,000 volts, cross railroads and street railroads, and wooden poles are used, spans shall not exceed 200 feet. In all cases the best selected poles shall be used for such crossings of minimum diameter not less than 8 inches. For power lines, the same factors of safety shall be observed as prescribed in the "Specifications" referred to hereinafter in section 9. Double cross arm construction shall be used in all cases and all poles or towers at crossings shall be suitably and securely guyed to prevent wires from sagging.

9. All power lines transmitting power at 15,000 volts and in excess thereon, and which cross over railroads, street railroads, telegraph, telephone, signal and other power lines, shall be constructed to conform to the "Specifications for overhead crossings of electric light and power lines," adopted at the present time by the Joint Committee of the National Electric Light Association, American Institute of Electrical Engineers, the American Electrical Railway Association, the Association of Railway Telegraph Superintendents, and the American Railway Engineering and Maintenance of Way Association, in so far as the same are not in conflict with any of the provisions of chapters 499 and 500 of the Statutes of the State of California of 1911, and except further that the clearances hereinbefore provided in this order, together with the restrictions thereon, shall be observed. And further provided that in those sec-
161 tions of this State where low temperature and ice loads do not obtain the specifications above mentioned may be modified to suit these conditions, provided that the prescribed factors of safety are observed.

NOTE.—It will be understood that this Commission adopts the Specifications at present issued by the Joint Committee above named, and any change, modification or alteration in same which may hereafter be issued or adopted by said Joint Committee will not be applicable to the matters contained in this order until submitted to and approved in formal order by this Commission.

As an alternative for the construction prescribed in the above specifications, poles of such length may be used for the crossing spans that a wire breaking at any point in the crossing span will swing clear of the wire leads beneath. As a further alternative, conditions permitting, when such power lines cross telegraph or telephone lines, the latter may be placed underground at the crossing span.

This order applies only in cases in which this Commission has urisdiction.

This order shall be effective on and after January 1, 1913.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA,
By CHARLES R. DETRICK, *Secretary.*

Dated December 14, 1912.
Commercial Building, San Francisco, California.

62 E. R. NORTHMORE recalled for redirect examination.

The Los Angeles Gas & Electric Corporation owns exclusively or in oint with other companies within the City of Los Angeles about 3,000 poles.

By Mr. Beach:

"Q. Assuming, Mr. Northmore, that the City of Los Angeles is oing to erect a municipal electrical street lighting system in the City f Los Angeles and that they will approximately follow the construc- on which is indicated on complainant's Exhibit 3, and that the same ffect, or practically the same effect will be had upon the wires and oles of the Los Angeles Gas & Electric Corporation, what do you timate, in the event the city proceeds as it has done in this instance, ordering the removal of poles and wires, it would cost the Los ngeles Gas & Electric Corporation throughout the City?

Mr. Mathews: If your Honor please, I submit the same objection at I urged to the last question, that it is incompetent, irrelevant, mmaterial and speculative.

The Court: The question means strictly this. What will it cost mplainant corporation here if the City proceeds to install its ectrical apparatus throughout the City and requires conformity in places where it approaches in close proximity to the apparatus of e plaintiff that is required in the particular instance under review.

Mr. Beach: Exactly.

The Court: Objection overruled.

Exception allowed defendants.

Mr. Northmore:

A. I should estimate it would cost the Los Angeles Gas & Electrical rporation between $50,000 and $60,000.

Recross-examination of Mr. Northmore.

The complainant owns approximately 30,000 poles within the City of Los Angeles; all of these have some kind of wires upon them. I do not know how many poles are included in the municipal system as it exists within the City. I based my imate of the cost to the complainant, assuming that orders were given der the ordinance affecting our entire system throughout the City, uming that the same conditions prevail as are on York Boulevard,

taking those two points of intersection on York Boulevard and Avenue 50 and York Boulevard and Avenue 53, it would cost the Los Angeles Gas & Electric Corporation about $10.00 a piece to make the changes on the two poles as required by the order of the Board of Public Works. When I say $10.00 in each of these instances I mean the actual cost of making the changes—that is, of doing the work, the labor and material cost. I do not attempt to estimate the damage which will be caused by the change. As soon as the change has been made our position on those poles would not be as valuable as it was before.

It was thereupon stipulated that the value of the right to exercise the franchises of the Los Angeles Gas & Electric Corporation in the public streets and thoroughfares of the City of Los Angeles exceeded the sum of $3,000 and was in excess of $4,000, the franchises last above referred to being electric franchises of the complainant pursuant to Sec. 19, Art. XI of the Constitution of the State of California.

It was thereupon stipulated by and between counsel that the City of Los Angeles and the Department of Public Service of said City have been erecting a system of poles and wires in the City of Los Angeles for the purpose of supplying and conveying electrical energy for light and for commercial and domestic uses. That the allegation thereof in the complaint is denied in the answer; that the denial in said answer goes only to the extent of denying that any profit
164 is made from said system, it being stipulated that the defendants are supplying said electrical energy for commercial and domestic uses for a remuneration and compensation under rates therefor with the expectation of said project being remunerative.

E. F. Scattergood, a witness called on behalf of complainant, being first duly sworn, testified as follows:

"By Mr. Beach:

Q. You are not conducting this system at a definite loss, are you?

A. It is not assumed when the system is more complete that the rate established and charged will result in any loss. It would be impossible to answer that question yes or no. We are now charging established rates for this electricity. We are charging the same rates as one private corporation is charging in that district."

It was thereupon stipulated, subject to the objection of defendants as to its competency, relevancy and materiality, that J. W. Kemp, a member of the Board of Public Service Commissioners of the City of Los Angeles, at a public meeting in the City of Los Angeles, April 23, 1917, before a quasi public body to wit: the Chamber of Commerce of the City of Los Angeles, made the following remarks:

"What are we going to do with all this extra horse power? As a matter of fact, we have not much extra horse power. What are we going to do with it? We are going down to the southwest and parallel the Gas Company. We will take the street lighting away

om them—$350,000 worth a year. That takes some of the busi-
ess of the P. L. & P. but it takes more from the L. A. Gas. That
what we will do with it. We are going to fight the Los Angeles
as with it.

Of course they want the City to fight the three companies. They
ould a great deal rather have the three companies fighting the City
an to have the City and the two companies fighting the L. A.
as Company. I admit that from the L. A. Gas Company's stand-
oint they are right. Absolutely, this is a bad thing for the Gas
ompany, and I hope it will get worse. I believe it will. I really
lieve it is going to get worse for the Los — Gas Company, and
be honest with you, the worse it is the better I will like it."

5 *Testimony of R. H. Manaham, a Witness Called on Behalf of the Defendants, The City of Los Angeles, a Municipal Corporation, et al.*

I am an electrical engineer employed in the service of the City
Los Angeles, a municipal corporation, in the capacity of city
ectrician, and have occupied that position since the year 1901.
my capacity as city electrician, I have supervision of the street
hting service of the City of Los Angeles, and am familiar with
e situation here known as York Boulevard, and at the intersection
that Boulevard and Avenues 50 and 53. I remember when the
e of the plaintiff corporation was originally constructed along
rk Boulevard, and the occasion for the construction of that line.
know Mr. Northmore, one of the engineers for the plaintiff cor-
ration, and knew him at the time he constructed the line on
rk Boulevard. I had something to do with the location of the
ps that were supported on poles composing a part of that line,
the time of the original construction, and in regard to the height
the poles at the street corners, I requested Mr. Northmore to
tall poles of a certain height in that district at the time of the
ginal construction in 1914. I am familiar with the poles that
e put at the intersections along York Boulevard in 1914, in
troversy. In the fall of 1913, a few months prior to the time
en the street lights were installed along York Boulevard, I had
onversation with Mr. Northmore with reference to the height of
poles supporting street lights at the intersection, in which I
ed to Mr. Northmore that in my opinion 50 or 55 foot poles
this district was a proper height for street lights, owing to the
ious scattered buildings at that time, and Mr. Northmore con-
red in my opinion, and the arc lamps were placed on these poles,
he intersections along York Boulevard at that height. In my
capacity as city electrician, I report to the Board of Public
Works and the request of a chief electrical engineer of the
city with reference to the removal or relocation of the struc-
of the plaintiff corporation at the points of intersection along
k Boulevard for report and I made a report to the Public Works
r an investigation of the subject matter of this request. This
estigation was made by me personally, on the ground, and I

saw the points on York Boulevard involved in this request, and I concurred in the recommendation of the electrical engineer of the municipal power board, as evidence by the request of the engineer to the Board of Public Works. After making my investigation I filed my report with the Board of Public Works recommending that the changes as requested, be ordered made. The other change which I recommended, in addition to the matter contained in the request, was the matter of clearances by the Pacific Light and Power Company at Avenue 50 and York Boulevard, and at that time I decided to request the Pacific Light and Power Company to lower their construction. The reason for the necessity of the change in the Pacific Light and Power Corporation's wires, at the point above stated, which is more fully designated on plaintiff's "Exhibit 3" I recommended to the Board of Public Works, was that the effect of lowering the wires of the Gas Company, designated in red, to the level, as shown by the white lines, would result in bringing the Gas Corporation's wires too close to the wires of the Pacific Light and Power Corporation. The Pacific Light and Power Corporation's lines were lowered a distance of four feet six inches. The green line, representing the Pacific Light and Power Corporation's wires in plaintiff's "Exhibit 3" do not show the wires of said Pacific Light and Power Corporation as they exist at the present time. Since the making of the model designated as plaintiff's "Exhibit 3" the wires of the Pacific Light and Power Corporation have been lowered.

Since the removal of the Pacific Light and Power Com-
167 pany's wires, as above stated, and considering all wires at said intersection as they stood at the time of the change affecting the Pacific Light and Power Corporation's wires, if the Los Angeles Gas and Electric Corporation did change the location of their wires in accordance with the order of the Board of Public Works of said city, all wires would have proper clearance, both as regards the state law, and the orders of the Railroad Commission of the State of California. After I had determined that fact I recommended to the Board of Public Works that the order be given and the request be granted. I also made a similar investigation of the pole and wire construction at the intersection of Avenue 53 and York Boulevard, and checked the request of the electrical engineer of the Board of Public Service Commissioners on the grounds, and I ascertained that if the changes were made as requested, the wires of the different corporations and the city would be in proper position as regards lawful proximity, and would conform with the State law, and as a result of my investigation I approved the request, and recommended that it be granted, I personally served the notice issued by the Board of Public Works on the Los Angeles Gas and Electric Corporation.

Testimony of Mr. R. H. Manaham Upon Cross-examination.

I saw the poles and wires of the plaintiff corporation in 191 after their installation, and their installation, location, and mann

of maintenance met with my approval, but in that regard I wish to explain myself, in that at the time those wires were erected, the positions they occupied in space interfered with no one, but at the time of the original installation I made no objection to their location or manner of maintenance, until at least December, 1916. I do not recall the erection of 50 foot poles, other than at the intersection of Avenue 50 and York Boulevard and at Avenue 53 and York Boulevard. I will say that it is true that traveling
168 toward the east from Avenue 53, along York Boulevard, the wires of the Los Angeles Gas and Electric Corporation are strung on poles for two or three blocks continuously and consecutively, at a height of 50 feet, at least these poles are being used by the Los Angeles Gas and Electric Corporation. I do not know when they were installed, but I think it is more than two years. I know that the request of the chief engineer of the Board of Public Service Commissioners was referred to me by the Board of Public Works, and that I went out here and looked at the poles and wires affected, and that the result of my investigation was that I made a recommendation to the Board of Public Works that the changes be ordered, as requested. My report in regard to the changes was substantially in the same form as was the subject matter contained in the request of the chief electrical engineer to the Board of Public Works. I did not make any change in the recommendations in the report made by me to the Board of Public Works. I was before the Board of Public Works at the time my report was read, and did not make any explanation or any addition to it, as none was asked for.

At the time I made the recommendation to the Board to grant the request contained in a communication from the electrical engineer of the power bureau, the Pacific Light and Power Corporation's wires had not been removed, and the change, as contemplated by my recommendation, could not be properly made, the actual physical lowering of the wires of the Pacific Light and Power Corporation was done by the employees of the Municipal Power Bureau, and was followed up by an official order from the Board of Public Works, to the Pacific Light and Power Corporation. The change in the wires by the Department of Public Service of the city was done with the permission of the Pacific Light and Power Corporation, and the Board of Public Works afterwards made
169 an order that they should be moved. When the wires of the Pacific Light and Power Corporation were moved, they were moved to an elevation of 38 feet 6 inches above the street. I am familiar with the state law and the general order of the Railroad Commission of the State of California in reference to clearances. The law requires a clearance between two power lines crossing one another, at approximately right angles, and which power lines are carrying current exceeding 600 volts, and not exceeding 15,000 volts, of four feet.

"By the Court:

Q. Which are 2200 volt wires?

A. The Pacific Light and Power wires—well, as a matter of fact they are 110-220 and 2200 volt wires on the north and south leads and 2200 volt wires on the easterly and westerly leads. The proposed position of the L. A. Gas & Electric primaries and the present position of the Pacific Light & Power secondaries and the primaries would be at least four feet apart.

By Mr. Goudge:

Q. Would be—you mean required by law to be?
A. Required by law to be."

I am familiar with that portion of General Order No. 26 of the Railroad Commission which you read to me to the effect:

"Power lines other than trolley wires and trolley feeders, from 600 to 15,000 volts, shall have a minimum clearance above wires at crossings with railroads and street railroads of 28 feet; above street and public highways, 24 feet; above telephone, telegraph and signal lines, for power lines from 600 to 6600 volts, four feet; and for power lines of from 6600 to 15,000 volts, six feet; above or below other power lines, of not exceeding 600 volts, four feet; above or below other power lines of from 600 to 15,000 volts, six feet."

The law may mean what it says above six feet clearance where two power lines cross one another, each of which is above 600 volts but the practice is to separate these lines four feet.

In the State of California at the present time, at the time this order from the Board of Public Works was made, it is common practice to leave a clearance of four feet between wires carrying from 600 to 15,000 volts. The rules of the Railroad Commission state that between wires carrying from 600 to 15,000 volts the clearance shall be four feet, and those wires are 2200 volt wires in this case. By those wires I mean the Pacific Light and Power Corporation's wires. I don't know what the law is. The recommendations that I made to the Board of Public Works, required the Los
170 Angeles Gas & Electric Corporation to take a level of 41 feet 6 inches, referring now to the pole and wires construction, with reference to pole No. 18597-G. The employees of the power bureau of the City of Los Angeles placed the cross arm of the Pacific Light and Power Corporation at a level of 37 feet, and the 35 feet 8 inches that I referred to is after allowing for the sagging. The wires of the Gas and Electric Corporation sag very little at that point; it is very close to the pole. If the wires of the Los Angeles Gas and Electric Corporation were installed in a manner as provided by the orders of the Board of Public Works, the plaintiff corporation could not put in another cross arm above or below the cross arm on which this relocated wire, as shown by the white thread, is placed.

Q. "I see. Now assume, Mr. Manahan, after these wires are installed in the manner that these orders required, and after the P. L. & P. wires are put as the bureau put them, and then made an order

establishing them thereafter, what could you say under the law could be done with reference to—in conformity with the law—by the Los Angeles Gas & Electric Corporation by way of putting in another cross arm above or below the cross-arm upon which this re-located wire, as shown by the white thread, would be placed? They could not go four feet above it, could they, without coming into unlawful proximity with the City's wires?

A. No, sir.

Q. They could not go four feet below it without coming into unlawful proximity with the P. L. & P. wires as relocated, could they?

A. It depends on whether you place that as a buck arm or line arm—what type of arm are you thinking of?

Q. A line arm.

A. They could not.

Q. And they could not go four feet below the Pacific Light & Power Corporation's wires as re-located for other reasons, could they?

A. Let's see—that is 35-8.

Q. You remember the P. L. & P. wires are not located yet.

A. No, I think they could go through with the 31 foot level.

Q. How would it be if they wanted to turn a corner and come across York Boulevard with a buck arm?

A. They could come across here with a buck arm.

Q. Below, on this lower level?

A. You mean below here (indicating)?

Q. Yes.

A. It is not necessary to make that crossing that way."

"A. The level of the Pacific Light and Power Company's wires is 35 feet 8. Four feet below the level of the Pacific Light & Power Company's wires would be 31, 8.

Mr. Mathews: I understand that level is the level as changed of the Pacific Light & Power Company's wires?

171 Mr. Goudge: Yes, sir.

A. The height of this cable here, I believe, is 27 feet.

Q. Which gives you 3 feet 4 inches between them. And isn't there a telephone wire on the top of the cable or above the cable?

Mr. Whitehead: That is 4 feet 8.

Mr. Goudge: Pardon me.

A. No, I am talking about this lead up through here.

Q. Well, what do you say about that? That would give you 4 feet 8 between the cable and the P. L. & P. wire, is that right?

A. No, it would give you 8 feet 8. The 27 foot cable and 35 feet 8 inches. The P. L. & P. wires are 35 feet and 8 inches.

Q. Four feet below that would be 31 feet 8 inches?

A. That is the position your wires could take on the south side of your Boulevard, running easterly and westerly.

Q. So you think there would be just room to squeeze through there?

A. Yes sir.

Q. Would it be good construction?

A. It would be no worse construction than has to be done somewhere in the city under conditions such as that."

It was thereupon stipulated that the witness C. A. Heinze, called on behalf of complainant, would testify concerning the clearances and character of construction of the poles and wires upon and along York Boulevard substantially in the same manner as the witness R. H. Manaham with the exception of the conversations testified to by said Manahan.

Testimony of C. W. Coiner, Witness Called on Behalf of the Defendants, The City of Los Angeles, a Municipal Corporation, et al.

I am an electrical and mechanical engineer, and the general manager of the City of Pasadena's electric utilities. Pasadena is a city of approximately 44,000 inhabitants, and I have occupied the position of manager of its electric utilities since March, 1908. I am familiar to a reasonable degree with the municipal system of the City of Los Angeles, and I have observed the construction in controversy as being at the intersection of Avenue 50 and York Boulevard, and Avenue 53 and York Boulevard. I have inspected the construction at these points with a view of testifying in this case. I am familiar with the wires at said intersection as they are at the present time. I have not read the order of the Board of Public Works in relation to this matter, but have inspected the wir-
172 ing as it has been changed, with particular reference to the Pacific Light and Power Corporation's wires, which have been lowered and the city's wires erected in their place and I am familiar with the measurements as to the clearance between the Pacific Light and Power Corporation's wires and the city's wires. I am familiar with the location and character of the construction of the lines of the Los Angeles Gas and Electric Corporation at the points above mentioned, and am familiar with the two models introduced in evidence on behalf of the plaintiff corporation, and have checked the models as to the measurements. I am familiar with the models in reference to the different colored threads which are placed thereon, and am of the opinion there is sufficient clearance between the city's 2200 volt wires, which are located below the 33,000 volt line, for the Los Angeles Gas & Electric Corporation's wires to pass through in the place provided on the city's poles. There is a difference of nine feet three inches at the point where the Los Angeles Gas and Electric Corporation's wires would cross the Pacific Light and Power Corporation's wires; that is to say, there is nine feet three inches from the city's 2200 volt cross arm and the Pacific Light and Power Company's wires, represented by the green strings, so there is sufficient room for the Los Angeles Gas and Electric Corporation's wires to go through, as from my observations and measurements.

As a constructor of electric systems, I consider it workmanlike construction, and the proper thing, and the thing to do to make the line uniform at each street intersection. It would be unreasonable

to attempt to maintain the wires in their old position, now that the arc lamp has been removed from the high pole and grading up from the 35 [illegible] pole line to high poles, and blocking the construc-
173 tion at the street intersections; that is unreasonable, whether the city does it, or a private corporation. As to the clearance, in my judgment it is the only thing to do, or it is the proper thing to do, to take the position for the two wires belonging to this Company (The Los Angeles Gas and Electric Corporation) and place them in the position provided for them. It would make the corner safe, and the construction would look more uniform. It would make it uniform; not only look uniform, but would make it uniform, and it does not block the whole corner so no one else can go through with their wires. It is absolutely necessary that all companies, where they meet at a corner like this, to correlate, and it is a give and take matter, and is absolutely necessary to change wires at such places. The city now, already has a sixty foot line, and that is a pretty tall line.

In reference to the clearances, from the view of maintaining proper distances for safe construction between wires, having reference to the wires of the Los Angeles Gas and Electric Corporation being removed to the positions provided by the order of the Board of Public Works, as I understand the situation, the position represents a space of four feet below the city's 2200 volt lines, and I would say that that is the proper place for it.

Testimony of Mr. Coiner on Cross-examination.

As to whether or not a distance of nine feet and some inches that exists between the city's line and the Pacific Light and Power Corporation's line would give room for the Los Angeles Gas and Electric Corporation's lines to pass through with sufficient clearance, would depend upon the voltage of the wires. I made the same careful investigations and observations of the intersection of Avenue 53 and York Boulevard, as shown on the model introduced in evidence as plaintiff's "Exhibit 3," as I did of the intersection at
174 Avenue 50 and York Boulevard. I did not observe that the wires and lines of the Los Angeles Gas and Electric Corporation were strung continuously and uniformly on fifty foot poles or higher east of Avenue 53. I observed that the Los Angeles Gas and Electric Corporation have a thirty-five foot pole east of Avenue 53. I only observed the first pole east of that corner belonging to that company. I do not know what the poles are east of that pole. I have been employed at different times in the capacity of consulting engineer for the City of Los Angeles, and have passed on questions with reference to the construction of its municipal distributing system. I did not pass on the height of poles along York Boulevard. In the event of a main line running along a street, and it is desirable or necessary to run service lines down a side street in the event of close proximity of a number of wires of other corporations, the wires leading off at right angles can be covered with insulating tubes that would make them safe. There are times when construc-

tion is so congested at corners that it is very hard to get a four foot clearance, and it is my opinion that in such cases the wires would be made safe in such a manner.

It is not clear to operating companies yet, whether they will have to take a four foot clearance under such circumstances. It is my understanding that the Railroad Commission of California is considering passing upon that question as to whether they will allow insulating tubes for such purposes. They do allow insulating tubes where we have to drop down from a top pole, through low tension wires to another position, to go off at right angles where one company may have a line of high poles and another company a line of lower poles. In that case fibre tubing is used to come from the top elevation to the lower elevation, and through the lower voltage wires; therefore, in my opinion, it is reasonable to assume it would be safe to use
175 insulating tubing for the purpose of going off from a buck arm at right angles.

"Mr. Beach: This witness has replied to your Honor's question, but we do not want to permit the assumptions of this witness and his understandings and theories to go in as evidence, withour our objection in the record.

The Court: Well, what are your objections?

Mr. Beach: My objection is that the witness is interpreting the statements concerning the Railroad Commission taking this matter up and are going to pass on it, and it is altogether clear——

The Court: Oh, well, that is mere conjecture. He doesn't know any more about it than we do.

Mr. Beach: I move that be stricken out.

The Court: Well, that will be paid no attention to, anyhow, that feature of it. What the Railroad Commission may do, nobody knows that except them. That is all."

The Railroad Commission, so far as I know, have not so ruled, and have not permitted the use of these tubes that I have referred to. It is not necessary in every instance, so far as compliance with the orders of the Railroad Commission is concerned, to drop four feet. We sometimes drop two feet. It is not clear to utility corporations whether we buck off at four feet, or two feet, and a ruling has been asked for, but it has not yet been given, so in some cases we have to use two feet instead of four.

Respectfully submitted, ALBERT LEE STEPHENS,
City Attorney,
W. B. MATHEWS,
WM. B. HIMROD,
LEWIS E. WHITEHEAD,
Attorneys for Defendants and Appellants.

Los Angeles, California,
October 17th, 1917.

It is hereby stipulated that the above and foregoing is a full, true and correct statement of all testimony, matters and evidence adduced

the trial of the above entitled cause and essential to the decision of the questions presented by the appeal herein.

H. C. BEACH,
PAUL OVERTON,
HERBERT J. GOUDGE,
Solicitors for Complainant.

The above statement is hereby approved.

BLEDSOE,
Judge of the District Court.

(Endorsed:) In Equity. No. 23. In the District Court of the ited States, for the Southern District of California, Southern Di- ion. Los Angeles Gas & Electric Corporation, a corporation, Com- inant, vs. The City of Los Angeles, a municipal corporation et al., fendants. Statement of the Evidence for Record on Appeal. Filed t. 18, 1917. Wm. M. Van Dyke, Clerk, by Chas. N. Williams, puty Clerk. Albert Lee Stephens, City Attorney, 300 Hosfield dg., Los Angeles, Cal., W. B. Mathews, Knickerbocker Bdg., At- ney- for Defendants.

In the District Court of the United States in and for the Southern District of California, Southern Division.

D-23. Equity.

s Angeles Gas and Electric Corp., a Corporation, Complainant,

vs.

e City of Los Angeles, a Municipal Corporation, et al., Defendants.

Messrs. Paul Overton, Herbert J. Goudge, and H. C. Beach of Los geles, California, Counsel for Complainant.
Messrs. Albert Lee Stephens, W. B. Mathews, William B. Himrod d Lewis E. Whitehead, of Los Angeles, California, Counsel for De- dants.

EDSOE, *District Judge:*

For a number of years, under a franchise obtained pursuant to the visions of the Constitution of California as it existed prior to 1911, e Russell vs. Sebastian, 233 U. S. 195) complainant, a public vice corporation, has been operating and maintaining its poles, es, conduits and other instrumentalities in the streets and public ces of the city of Los Angeles for the purpose of supplying and rnishing electrical energy to said city and to the inhabitants reof for illuminating and other purposes.

Complainant is now serving electrical energy to approximately forty usand consumers in such city, and the value of its property ded- ed and engaged in such public service aggregates several millions

of dollars. Its poles, wires and other instrumentalities have been installed in and upon the streets and other public places in said
178 city under the direction of the Board of Public Works thereof—the department of the city government having charge of streets and thoroughfares.

The defendant City of Los Angeles, being authorized so to do under the laws of the State, is now, and for some months past has been, engaged in the erection, construction and operation of a distributing system for the distribution and sale of electrical energy to be used for the purposes of lighting the streets and public places in the City of Los Angeles, and supplying to the inhabitants and others in said city electrical energy for illuminating and other purposes, for a remuneration.

On the 7th day of March of this year the defendant city through its duly constituted legislative body enacted an ordinance, the validity of which constitutes the only real question in this case. The purpose and far-reaching effect of the ordinance can be stated in no better way than by a recital of its title and its material terms. It was entitled as follows:

"An Ordinance providing for the removal or relocation of poles and other properties located in public streets and other public places of the City of Los Angeles, when necessary in order that the municipal electrical street lighting system may be constructed, operated and maintained therein."

The body of the ordinance then provides that:

"Whereas, the public peace, health and safety demand the construction and establishment by the City of Los Angeles of an electrical system, whereby the public streets and other public places of said city may be lighted, and, to that end, it is necessary that pole and wire lines, street lamps fixtures, and other incidental appliances, should be installed in the public streets and public places of said city as speedily as may be practicable; and,

"Whereas, various persons, firms and corporations are maintaining in the public streets and other public places of said city, poles,
179 anchors, cross arms, wires, street lamps and other fixtures, appliances and structures, and it is necessary, in order that sufficient space may be secured for said municipal electrical system in said public streets and public places, and that the work of constructing and establishing the same may be carried on, to provide for the removal or relocation of certain of said poles and other properties so maintained by said persons and corporations,

"Therefore:

"The Mayor and Council of the City of Los Angeles do ordain as follows:

"Section 1. That whenever it shall appear to the Board of Public Works of said city that the removal or relocation of any pole, anchor, cross arm, wire, street lamp, or any other fixtures, appliance or structure, owned or controlled by any person, firm or corporation, and located in, upon, over or under any public street or public place of said city, is necessary in order that the Municipal Electrical Street

Lighting System of said city, or any part thereof, may be erected, operated or maintained in such public street or public place, then said Board shall give notice in writing to the person, firm or corporation owning or controlling said pole or other property, located as aforesaid, to remove or relocate the same; that such notice shall state the number and location of the poles, anchors, cross arms, wires, street lamps, or other fixtures, appliances or structures, to be removed or relocated, and, when relocation of any such poles, anchors, cross arms, wires, street lamps, or other fixtures, appliances or structures, is required in such notice, then such notice shall designate the location in, upon, over or under any such public street or other public place to which the same shall be removed; and it shall be the duty of
180 such person, firm or corporation to begin, within five (5) days after the giving of such notice, the work of removing or relocating the poles, anchors, cross arms, wires, street lamps, or other fixtures, appliances or structures designated in such notice, and to prosecute such work diligently to completion.

"Section 2. It shall be unlawful for any person, firm or corporation owning or controlling any pole, anchor, cross arm, wire, street lamp, or any other fixtures, appliance or structure located in, upon, over or under any public street or other public place in the City of Los Angeles, to fail or refuse to begin the work of removing or relocating such pole, anchor, cross arm, wire, street lamp, fixture, appliance or structure within five (5) days after receiving notice in writing from the Board of Public Works of said city so to do, as provided in Section 2 of this ordinance.

"Section 3. It shall be unlawful for any person, firm or corporation owning or controlling any pole, anchor, cross arm, wire, street lamp, or any other fixture, appliance or structure located in, upon, over or under any public street or other public place in the City of Los Angeles, to neglect or refuse, after five (5) days' notice in writing from the Board of Public Works of said City to said person, firm or corporation, as provided in Section 2 of this ordinance, to remove or relocate any such pole, anchor, cross arm, wire, street lamp, fixture, appliance or structure to diligently prosecute such removing or relocating to completion.

"Section 4. That any person, firm or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punishable by a fine of not more than Five Hundred Dollars ($500) or by imprisonment in the City Jail for a period of not more than six (6) months, or by both such fine and imprisonment.
181 "Each such person, firm or corporation shall be deemed guiity of a separate offense for every day during any portion of which any violation of any provision of this ordinance is committed, continued or permitted by such person, firm or corporation, and shall be punishable therefor as provided by this ordinance.

"Section 5. That said Board of Public Works, or the board, commission or officer of said city having in charge the construction and establishment of said municipal electrical system, shall have power to move or relocate any pole, anchor, cross arm, wire, street lamp,

or any other fixture, appliance or structure, owned and controlled by any person, firm or corporation in a public street or public place in said city, where such person, firm or corporation shall fail, within five (5) days after receipt of notice, as aforesaid, to begin the work of removing or relocating the same, or shall fail to diligently prosecute such work to completion.

"Section 6. That said city is now engaged in the construction of an electrical system for lighting the public streets and other public places of said city; that said city has heretofore been compelled to depend on contracts with private utility corporations for furnishing lighting for such public streets and public places and some of said contracts have already expired and all of said contracts will have expired by July 1, 1917, and the completion of said municipal system is necessary in order that said city may be able to provide for lighting its public streets and other public places without interruption; that the removal and relocation of certain poles, anchors, cross arms, wires, street lamps and other fixtures, appliances and structures, owned or controlled by various persons, firms or corporations and located in said public streets and other public places of said
182 city, are immediately necessary in order that the city may complete and install its said electrical system; therefore, this ordinance is urgently required for the immediate perservation of the public peace, health and safety; and the City Clerk shall certify to its passage by a unanimous vote, and cause the same to be published once in the Los Angeles Daily Journal and thereupon and thereafter it shall take effect and be in force."

Pursuant to the terms of the ordinance, after appropriate action by the Board of Public Works, plaintiff was notified to move certain of its wires to new locations and remove entirely certain other fixtures. This action was thereupon commenced asking that the city officials be enjoined from enforcing said order, and that said ordinance be declared null and void. A temporary restraining order was issued and the case is before the court on final hearing. Persuasive testimony was introduced showing that a compliance with the ordinance at all places throughout the city where changes would be necessary would entail an expenditure on plaintiff of over $50,000.

It is apparent from even a casual reading of the enactment, that, if it be valid, "in order that the municipal electrical street lighting system may be constructed, operated and maintained," the city purposes, in so far as and whenever the same may be necessary to allow of the proper installation of the municipal system, to require complainant and other privately owned companies holding franchises and maintaining instrumentalities for the transmission and delivery of electrical energy in the city of Los Angeles to remove to such places as may be ordered by the City all apparatus and instrumentalities that may interfere with the proper installation of the municipal system. In other words, the City of Los Angeles having decided, because of reasons which were no doubt sufficiently cogent and persuasive, that it would engage in the business
183 of furnishing electrical energy to itself and to its inhabitants, in order that it may proceed in accordance with its own

termined plans in the premises, has decreed by ordinance that ivately owned companies engaged in the same business, and now d for some time lawfully occupying the public streets, may be quired to remove or relocate, at their own expense, and subject to penalty of fine and imprisonment for refusal, such instrumentalies situate upon the public ways of the city as seem to interfere th the proposed installation of its system. Or, to phrase it still fferently, in order that its own municipal lighting system herefore determined upon may be installed, the city has enacted that, so far as the same may be necessary, other systems already inalled and belonging to private corporations, must be removed or located at the expense of the owners thereof.

It is asserted by the city that the right to do this thing which, first blush, would seem to be rather sweeping and autocratic, is stified by "public necessity," (New Orleans Gas Co. v. Drainage mmission, 197 U. S. 453), and the "police power." Conceding for purposes of argument merely, that a public necessity could ist sufficient to entitle the city to assert such an authority over ivate property, its suffices, in my judgment, to state that no such cessity has been shown to exist in this controversy.

If it were true that privately owned utility companies were occupying the streets of the City of Los Angeles to the exclusion of y new entrant therein, and that they were either refusing or re unable adequately to provide for the lighting of the city, it ight be that such a situation would justify, under the police power the city, the assertion of the authority contemplated in the ornance under consideration. This court, however, because of its nowledge of local conditions will take judicial notice, and in fact it is demonstrated by the very language of the ordinance 4 itself, that there are at the present time several companies engaged in generating and furnishing electrical energy in e city and to its inhabitants. The suggestion is no where made, uch less substantiated by evidence, that there is any such present probable inadequacy in the matter of the supplying of such ergy as to justify the finding, or the inference, that the city itself compelled, on grounds of "public necessity," to go into the busiss of furnishing light to itself and its inhabitants. The very dinance recites that "various persons, firms and corporations are aintaining in the public streets and other public places of said ty, poles, anchors, cross arms, wires, street lamps and other fixres, appliances and structures, and it is necessary in order that fficient space may be secured for said municipal electrical system said public streets and public places, and that the work of conructing and establishing the same may be carried on, to provide r the removal or relocation of certain of said poles and other roperties so maintained by said persons and corporations." This nguage of the ordinance, which no doubt was framed in view existing conditions, telis its own story in illuminating fashion, nd demonstrates that there is no real "public necessity" for the ty engaging in the business of furnishing light. The only necessity" existing is that in order that the city system may be

installed as planned, other systems now in place shall be moved. Indulging in the obvious inferences justified by the language of the ordinance, under the law and from the conditions easily observable, the court must assume, in the absence of evidence of a persuasive nature to the contrary, that with the regulatory powers of the law at hand, (Price v. Riverside Co., 56 Cal. 431; Pinney & Boyle Co., v. L. A. Gas Corp., 168 Cal. 12, 15; Russell v. Sebastian, 233 U. S. 195, 208; 26 Cyc. 377) the city could compel the companies operating within its confines to furnish sufficient light for its inhabitants at a fair and reasonable remuneration there-
185 for.

In so construing the situation the court conceives that it is giving to the phrase "public necessity" the meaning usually accorded to it when dealing with the police power. I doubt not that the city has embarked upon the venture of furnishing and distributing electrical energy with perfect and commendable propriety. I doubt not that after careful and painstaking investigation it has been found that the city may engage in this undertaking with profit to itself and to its inhabitants. I am assuming that, ultimately and in due course, the public welfare and the public convenience and the public exchequer will be augumented by this indulgence in municipal activity. I am simply stating, however, what seems to me to be the obvious, that the motives which prompted this undertaking have been those of propriety and expediency rather than those of necessity, as that term is defined and understood by those who have to do with the construing of the police power.

What ever the city may do under the guise of the police power it must be remembered it does in its governmental capacity. The exercise of the police power has been most aptly and perhaps most comprehensively defined as "the power to govern," (License Cases, 5 How. 504, 582) the "most illimitable" of all powers of government, (The Slaughter House Cases, 16 Wall. 36, 62), the "law of overruling necessity," 28 Cyc. 692. What ever the city does, however, in the matter of actually engaging in the furnishing and delivering of electrical energy to itself and its inhabitants is done in its proprietary or quasi-private capacity. (Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 8, 10. South Pasadena v. Pasadena Land Co., 152 Cal. 579, 593; Safety Insulated Wire Co., v. Baltimore, 66 Fed. 140, 143), and the two must always be clearly differentiated in any attempt to define and determine the rights of a city in such a controversy as the present.

186 While operating in its private capacity, and considerations of necessity giving rise to an exertion to the police power being non-existent, as adverted to hereinabove, the power of police is wanting and may not be asserted in furtherance of that which is merely expedient. In other words, when acting clearly within the domain of its private and proprietary capacity, the city may not draw sustenance or power to itself through an assumption of public and governmental functions. As said by the Supreme Court of the United States in South Carolina v. United States, 199 U. S. 437,

p. 463, quoting from a Pennsylvania case where the question of the city supplying gas to its inhabitants was under consideration:

"Such contracts are not made by the municipal corporation by virtue of its powers of local sovereignty, but in its capacity of a private corporation. The supply of gaslight is no more a duty of sovereignty then the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city, as much so as the lands and houses belonging to it. *Blending the two powers in one grant does not destroy the clear and well-settled distinction,* and the process of separation is not rendered impossible by the confusion. In separating them, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage
187 and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company. It stands on the same footing as would any individual or body of persons, upon whom the like special franchises had been conferred." (Italics supplied.)

The doctrine therein asserted and the holding in that case seem to have met with approval by the Supreme Court of California, as intimated in Davoust v. Alameda, 149 Cal. 69, p. 72.

If the engaging of the city in the business of furnishing electrical energy to itself and its inhabitants is in all respects a purely private venture as thus indicated, and if it is to be accorded the same and no other consideration then any other private venture of the same character, it would seem indubitably clear that the city, acting in its governmental capacity, would have no authority to confer rights upon its own lighting system based upon and growing out of a destruction and disregard of the rights of other systems engaged in the same business and standing in the same relation to the law. And this would seem to be true whether we accept the conclusion of the majority of the court, or the concurring opinion of Mr. Justice Shaw, in the California case just cited. (149 Cal. 69, p. 75.) So understanding the law, it would hardly be contended, and if contended would hardly meet with judicial approval, that the city, in the exercise of its police power or otherwise, possesses authority to provide that one public utility company having a lawful franchise to serve the city and serving it, can be compelled to move or relocate its properties in order that another company similarly engaged may be installed or be enabled to carry on its business.

It is the law, without question, based no less upon reason than upon judicial authority, that upon a corporation like com-
188 plainant securing a franchise to serve the public in the respect herein indicated, it acquires no right under such franchise to locate or maintain its poles or other instrumentalities at any

particular place upon the public streets. In its occupancy of public places, it has a right to do a particular thing, but no right to be in a particular place. It is subject of course, at all times, to such due and reasonable regulation as may be enjoined upon it by competent authority, having in view the rights of others who may have use for the streets and having also in view the necessities of the occasion and the demands of the public from time to time. (New Orleans v. Drainage Commission, 197 U. S. 453.) It may, under its franchise, occupy no more space upon the public street than is reasonably necessary for the performance of the high public duty and purpose incumbent upon it. Without doubt, the location of its wires and conduits may be limited either laterally or vertically, or even caused to be buried beneath the surface, as the same may be required under the demands of public necessity and public convenience. When, however, pursuant to the terms of its lawful franchise, it has established its poles and wires and other instrumentalities in the public streets, it may lawfully and properly object to being compelled to remove or relocate them in order that another company, a competitor of later origin and right coming in, may take their place and thereby be enabled to carry on its own intended business. In other words, in this as in many other relations, first in time is first in right, and superiority of right consequent upon being first in the time may not be nullified by even necessary requirements of a competitor or other utility later in time and therefore inferior in right. (Edison
189 Electric Light & Power Co., v. Merchants & Manufacturers Co., 200 Pa. St. 209, p. 219; Paris Electric Light Co., v. Southwestern Telegraph Co., 27 S. W. 902; Rutland Electric Light Co., v. Marble City Electric Light Co., 20 L. R. A. 821.)

In 200 Pa. St. 209, p. 219, the Supreme Court of Pennsylvania said:

"As between two corporations exercising similar functions upon the same street, priority carries superiority of right. Equity will adjust the conflicting interests as far as possible and control both so that each company may exercise its own franchises as fully as is compatible with the necessary exercise of the other. But, if limitation or interference of one or the other are unavoidable, the later must give way, and the fact that it is under contract with the city for work of a public nature does not alter its position or give it any claim of preference."

By the same token, the fact that the later corporation is the city itself instead of being "under contract with the city for work of a public nature" would create no right superior to those of the earlier occupant of the field. This case was approved by the same court in Edison Electric Co., v. Citizens Electric Co., 235 Pa. St. 492, p. 507. (See also Bell Telephone Co., v. Belleville Electric Co., 12 Ont. Rep. (Queen's Bench Div.) 571; Western Union Tel. & Tel. Co., v. Los Angeles Electric Co., 76 Fed., 178.)

If, on the grounds of necessity urged, the city could rightfully under the law assert the power to compel the removal and relocation of complainant's instrumentalities, in order that its own instrumentalities might be installed in accordance with its predetermined plans

it would seem to me to be equally true that, similar conditions of necessity respecting its ability to maintain the system existing, the city could lawfully enact that no resident of the municipality
190 along the line of its lighting system should be furnished with electrical energy from any system save the municipal system. This would be a most effective way of furthering the interests and welfare of the city if the success of its municipal system is to be taken as an index of its welfare, but at the same time, obviously, it would be in complete and utter disregard of the rights of complainant and others situated like it. I cannot see, however, that such a course of action would present any substantially different legal problem from that now before the court.

Of course it is to be assumed in this controversy that in all its actions to be had and taken under and pursuant to this ordinance, if valid, the city will be actuated only by motives of necessity, in so far as they may be though- to exist, and that it will enforce as little inconvenience and expense upon complain-t in the matter of the readjustment of its poles and wires as is compatible with the proper and satisfactory installation of the municipal system. Be that as it may, however, yet, in so far as the city intrenches upon the superior right acquired because of prior location by complainant, and in so far as it requires complainant to re ocate its instrumentalities at its own expense, not as a matter of genume "public necessity" and justified by considerations of public welfare under the police power but merely in order that the instrumentalities of the city may be located in their place, its action is, in my judgment, arbitrary, unreasonable and in violation of the superior right of location belonging to complainant, and is, in effect, an appropriation of plaintiff's property without compensation. (Woodward v. Central Vermont Rwy. Co., 180 Mass. 599; concurring opinion of Mr. Justice Holmes, C. B. & Q. Rwy. Co., v. Drainage Commissioners, 200 U. S. 561, 595) and is also an impairment of the contractual right accorded to complainant in virtue of its compliance with the constitutional provision hereinabove referred to and its acquisition and acceptance of
191 the constitutional franchise enabling it to perform the public service in which it is now engaged. (Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 17; Grand Trunk Rwy. Co., v. South Bend, 227 U. S. 544, p 553.)

Defendant in support of its asserted right to enact and enforce the ordinance in question has cited to the court no case which seems to stand in any wise as a precedent to the action herein taken. The arguments advanced by counsel are not persuasive for the reasons adverted to hereinabove. The cases cited by counsel, however, which it is claimed do lend support to the contentions of defendant, are C. B. & Q. Rwy. Co., v. Illinois, 200 U. S. 561; New Orleans Gas Co. v. Drainage Commissioners, 197 U. S. 553; Union Bridge Co., v. U. S. 204 U. S. 364; and many other cases of similar trend and nature. Obviously, however, as the merest reading of those cases will show, they announce no doctrine different from that accepted herein, to-wit: that a public service corporation like the plaintiff, in the performance of its duty to the

public under franchise or other similar contract, has no right to any particular location in or upon the public streets or high ways, but that it is at all times subject to the police power of the state and subject to such general regulations as may arise from and spring out of the necessities of the public welfare and convenience. Neither of these cases, however, and none that have been cited or to which the attention of the court in its labors has been directed, may be said to go to the extent that a city or other sovereign functionary, having embarked upon a business venture, may assert its sovereign power merely for the purpose of enabling it successfully to install its own properties and in violation of superior rights of location belonging to a competitor because of priority of installation.

As indicated hereinabove, assuming the necessity, propriety and expediency of such course to have been satisfactorily determined by those in authority, I am in entire harmony with a plan of municipal improvement such as has been projected in the City of Los
192 Angeles and as is here under consideration. I am, however, also firmly of the belief that until the city, by purchase, appeal to eminent domain, or otherwise has lawfully and properly and justly eliminated competition, it must meet its competitors as any other private agency would be compelled to meet them, and must stand with them in the same relation to the law and let its success be measured by its ability satisfactorily to serve the public, rather than by its power th-ough the exertion of public functions to occupy a position of supremacy in the field which it deliberately has chosen to invade.

A decree will be entered declaring the ordinance void and enjoining its enforcement.

May 11, 1917.

(Endorsed:) No. D-23 Equity. U. S. District Court, Southern District of California, Los Angeles Gas & Elec. Corp., Complainant, vs. The City of Los Angeles, a municipal Corp., et al. Defendants. Opinion of Court. Filed May 11, 1917. Wm. M. Van Dyke, Clerk, by Chas. N. Williams, Deputy Clerk.

193 In the District Court of the United States in and for the Southern District of California, Southern Division.

In Equity.

No. D-23.

LOS ANGELES GAS AND ELECTRIC CORPORATION, a Corporation, Complainant,

vs.

THE CITY OF LOS ANGELES, a Municipal Corporation, et al., Defendants.

Decree.

The above entitled cause having come regularly on for trial on the 13th day of April, 1917, before the above entitled Court and the

onorable Benjamin F. Bledsoe, Judge thereof; complainant ap-
aring and being represented by its solicitors, H. C. Beach, Esq.,
aul Overton, Esq., and Herbert J. Goudge, Esq. and defendants,
d each of them, appearing and being represented by their
licitors, Messrs. Albert Lee Stephens, W. B. Mathews, Wm. B.
imrod and Louis E. Whitehead, and evidence both oral and
ocumentary having been offered and received for and on behalf of
mplainant and defendants; and the evidence being closed and said
use having been submitted to the Court for decision; and the Court
aving heard the arguments of counsel and being fully advised in
e premises, and having heretofore made and filed its decision upon
e merits of said cause:

It is now, therefore, ordered, adjudged and decreed that that cer-
in purported ordinance of defendant The City of Los Angeles
assed and adopted on the Seventh day of March, 1917, the same be-
g numbered 36,125 (New Series) and being in the following
ords and figures, to-wit:

94 *Ordinance No.* 36125.

(New Series.)

An Ordinance providing for the removal or relocation of poles and other properties located in public streets and other public places of the City of Los Angeles, when necessary in order that the Municipal Electrical Street Lighting System may be constructed, operated and maintained therein.

Whereas, the public peace, health and safety demand the construc-
ion and establishment by The City of Los Angeles of an electrical
ystem, whereby the public streets and other public places of said
ity may be lighted, and, to that end, it is necessary that pole and
ire lines, street lamps and fixtures, and other incidental appliances,
hould be installed in the public streets and public places of said
ity as speedily as may be practicable; and,

Whereas, various persons, firms and corporations are maintaining
n the public streets and other public places of said city, poles,
nchors, cross arms, wires, street lamps and other fixtures, appliances
nd structures, and it is necessary, in order that sufficient space may
e secured for said municipal electrical system in said public streets
nd public places, and that the work of constructing and establish-
ng the same may be carried on, to provide for the removal or re-
location of certain of said poles and other properties so maintained
by said persons and corporations, Therefore:

The Mayor and Council of The City of Los Angeles do ordain as
follows:

Section 1. That whenever it shall appear to the Board of Public Works of said city that the removal or relocation of any pole, anchor, cross arm, wire, street lamp, or any other fixture, appliance or structure, owned or controlled by any person, firm or corpora-

195 tion, and located in, upon, over or under any public street or public place of said city, is necessary in order that the Municipal Electrical Street Lighting System of said city, or any part thereof, may be erected, operated or maintained in such public street or public place, then said Board shall give notice in writing to the person, firm or corporation owning or controlling said pole or other property, located as aforesaid, to remove or relocate the same; that such notice shall state the number and location of the poles, anchors, cross arms, wires, street lamps, or other fixtures, appliances or structures, to be removed or relocated, and, when relocation of any such poles, anchors, cross arms, wires, street lamps, or other fixtures, appliances or structures, is required in such notice, then such notice shall designate the location in, upon, over or under any such public street or other public place to which the same shall be removed; and it shall be the duty of such person, firm or corporation to begin, within five (5) days after the giving of such notice, the work of removing or relocating the poles, anchors, cross arms, wires, street lamps, or other fixtures, appliances or structures designated in such notice, and to prosecute such work diligently to completion.

Sec. 2. It shall be unlawful for any person, firm or corporation owning or controlling any pole, anchor, cross arm, wire, street lamp, or any other fixture, appliance or structure located in, upon, over or under any public street or other public place in the City of Los Angeles, to fail or refuse to begin the work or removing or relocating such pole, anchor, cross arm, wire, street lamp, fixture, appliance or structure within five (5) days after receiving notice in writing from the Board of Public Works of said city so to do, as provided in Section 2 of this ordinance.

Sec. 3. It shall be unlawful for any person, firm, or corporation owning or controlling any pole, anchor, cross arm, wire, 196 street lamp, or any other fixture, appliance or structure located in, upon, over or under any public street or other public place in the City of Los Angeles, to neglect or refuse, after five (5) days' notice in writing from the Board of Public Works of said city to said person, firm or corporation, as provided in Section 2 of this ordinance, to remove or relocate any such pole, anchor, cross arm, wire, street lamp, fixture, appliance or structure to diligently prosecute such removing or relocating to completion.

Sec. 4. That any person, firm or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punishable by a fine of not more than Five Hundred Dollars ($500.00) or by imprisonment in the City Jail for a period of not more than six (6) months, or by both such fine and imprisonment.

Each such person, firm or corporation shall be deemed guilty of a separate offense for every day during any portion of which any violation of any provision of this ordinance is committed, continued or permitted by such person, firm or corporation, and shall be punishable therefor as provided by this ordinance.

Sec. 5. That said Board of Public Works, or the board, commission or officer of said city having in charge the construction and

ablishment of said municipal electrical system, shall have power move or relocate any pole, anchor, cross arm, wire, street lamp, or y other fixture, appliance or structure, owned and controlled by y person, firm or corporation in a public street or public place in id city, where such person, firm or corporation shall fail, within e (5) days after receipt of notice, as aforesaid, to begin the work removing or relocating the same, or shall fail to diligently prose-te such work to completion.

Sec. 6. That said city is now engaged in the construction of 7 an electrical system for lighting the public streets and other public places of said city; that said city has heretofore been mpelled to depend on contracts with private utility corporations r furnishing lighting for such public streets and public places and me of said contracts have already expired and all of said contracts ll have expired by July 1, 1917, and the completion of said munic-al system is necessary in order that said city may be able to pro-de for lighting its public streets and other public places without in-rruption; that the removal and relocation of certain poles, anchors, oss arms, wires, street lamps and other fixtures, appliances and ructures, owned or controlled by various persons, firms or corpora-ons and located in said public streets and other public places of said ty, are immediately necessary in order that the city may complete d install its said electrical system; therefore, this ordinance is rgently required for the immediate preservation of the public peace, ealth and safety; and the City Clerk shall certify to its passage by unanimous vote, and cause the same to be published once in The os Angeles Daily Journal and thereupon and thereafter it shall take fect and be in force.

I hereby certify that the foregoing ordinance was passed by the ouncil of the City of Los Angeles by the unanimous vote of all the embers of said Council present, there being not less than seven embers present, at its meeting of March 6th, 1917.

CHAS. L. WILDE, *City Clerk.*

Approved this 7th day of March, 1917.

F. T. WOODMAN, *Mayor.*

08 be, and the same is as to complainant hereby declared illegal, invalid, null, void and of no force or effect.

It is further ordered, adjudged and decreed that that certain notice ated March 24, 1917, and addressed to complainant Los Angeles as and Electric Corporation from Board of Public Works of The ity of Los Angeles in the words and figures as follows, to-wit:

"March 24, 1917.

os Angeles Gas & Electric Corporation, Los Angeles, Cal.

GENTLEMEN: At a meeting of the Board of Public Works of Los ngeles, California, held March 21, 1917, you were directed to make he following changes in the elevation of your wires, cross arms, etc., n York Boulevard to-wit:

Armadale Avenue and York Boulevard, remove old pole top fixture from top of your pole No. 10595-G and lower your wires taking any position you may desire below 41 feet above curb line.

York Boulevard and Avenue 49, remove old pole top fixture from top of your pole No. 16396-G and lower your wires, taking any position you may desire below 41 feet above curb line.

York Boulevard and Avenue 50, remove pole top fixture from pole No. 18596-G. Lower wires on York Blvd. on pole No. 18597-G to 41 feet 6 in. level. Lower wires on No. 18597-G running south on Avenue 50 to any level between 41 ft. 6 in. and 39 ft. 6 inch. Place your wires on pole No. 4393-M on present city arm at 41 ft. 4 in. level.

York Boulevard and Avenue 51, remove old pole top fixture from your pole No. 18599-G, and lower your wires to any position below 40 feet above the curb line.

York Boulevard and Avenue 52, lower your wires on your pole No. 18600-G to any position below 41 feet above curb line.

York Boulevard and Avenue 53; lower line arm on pole No. 18603-G to the 36 ft. 6 in. level using the 34 ft. 6 in. level for buck arm for wires running north on Avenue 53.

This order is given pursuant to the provisions of Ordinance No. 36,125 New Series, which provides that the work of removal and relocation shall be commenced within a period of 5 days from the receipt of this notice and prosecuted diligently to completion.

Yours very truly,

BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES,

By LORIN A. HANDLEY, *President*,

By HORACE B. FERRIS, *Secretary*.

be, and the same is hereby declared to be, invalid, void and inoperative for any purpose whatsoever.

It is further ordered, adjudged and decreed that defendants
199 The City of Los Angeles, a municipal corporation; Frederick T. Woodman, as Mayor of The City of Los Angeles; Board of Public Works of The City of Los Angeles, and Lorin A. Handley, Patrick J. O'Brien and Owen McAleer, members of and constituting the Board of Public Works of The City of Los Angeles, and Reginald F. Del Valle, Louis H. Valentine, John W. Kemp and Byron Erkenbrecher, members of and constituting the Board of Public Service Commissioners of The City of Los Angeles; the Council of The City of Los Angeles, and Martin F. Betkouski, James S. Conwell, Frederick C. Langdon, Estelle Lawton Lindsey, Robert T. Brain, William A. Roberts, Foster C. Wright, Fred C. Wheeler and Michael T. Collins, as members of and constituting the Council of The City of Los Angeles; John L. Butler, Chief of Police of The City of Los Angeles, and Ezra F. Scattergood, Chief Electrical Engineer of the Bureau of Power and Light of The City of Los Angeles, and each of them, their officers, agents, servants, attorneys and employees, be perpetually enjoined and restrained from in any wise or in any manner enforce-

ing, acting under, or carrying or attempting to carry into effect as against complainant any of the provisions of said purported ordinance of The City of Los Angeles numbered 36,125 (New Series), or any part thereof.

It is further ordered, adjudged and decreed that a writ of permanent injunction be issued out under the seal of this Court by the Clerk thereof, directed to defendants, and each of them, perpetually enjoining and restraining them, and each of them, their officers, agents, servants, attorneys or employees, from in any wise or in any manner enforcing, acting under, or carrying or attempting to carry into effect as to or against complainant any or all of the provisions of said purported ordinance numbered 36,125 (New Series), or any part thereof.

BENJAMIN F. BLEDSOE, *Judge.*

Costs taxed at $180.72.

Dated this 15th day of June, 1917.

Decree entered & recorded June 15, 1917.

WM. M. VAN DYKE, *Clerk,*
By T. F. GREEN, *Deputy.*

200 (Endorsed:) No. D-23. Equity. In the District Court of the United States, in and for the Southern District of California, Southern Division. Los Angeles Gas and Electric Corporation, Complainant vs. The City of Los Angeles, et al., Defendants. Decree. Filed Jun- 15, 1917. Wm. M. Van Dyke, Clerk, by T. F. Green, Deputy Clerk. H. C. Beach, Paul Overton, Herbert J. Goudge, 645 South Hill Street, Room 31 Los Angeles, Cal., Attorneys for Complainant.

201 In the District Court of the United States in and for the Southern District of California, Southern Division.

No. D 23. Equity.

LOS ANGELES GAS AND ELECTRIC CORPORATION, a Corporation, Complainant,

vs.

THE CITY OF LOS ANGELES, a Municipal Corporation, et al., Defendants.

Writ of Injunction.

The President of the United States of America, Greeting:

To the City of Los Angeles, a Municipal Corporation; Frederick T. Woodman, as Mayor of The City of Los Angeles; Board of Public Works of The City of Los Angeles and Lorin A. Handley,

Patrick J. O'Brien and Owen McAleer, members of and constituting the Board of Public Works of The City of Los Angeles, and Reginald F. Del Valle, Louis H. Valentine, John W. Kemp and Byron Erkenbrecher, members of and constituting the Board of Public Service Commissioners of The City of Los Angeles; the Council of The City of Los Angeles and Martin F. Betkouski, James S. Conwell, Frederick C. Langdon, Estelle Lawton Lindsey, Robert T. Brain, William A. Roberts, Foster C. Wright, Fred C. Wheeler and Michael T. Collins, as members of and constituting the Council of The City of Los Angeles; John L. Butler, Chief of Police of The City of Los Angeles, and Ezra F. Scattergood, Chief Electrical Engineer of the Bureau of Power and Light of The City of Los Angeles, and each of them:

Whereas, on the 15th day of June, 1917, a Decree was made and entered by the above-entitled Court, and in the above-entitled cause, wherein and whereby, it is Ordered, that a Writ of Permanent Injunction issue, enjoining you and each of you, your agents, attorneys, servants, employees and successors in office or assigns of either or any of them, and all persons whomsoever from in any wise or in any manner enforcing, acting under or carrying or
202 attempting to carry into effect as to or against, the Los Angeles Gas and Electric Corporation, a corporation, any or all of the provisions of a purported Ordinance number 36125 (New Series) of defendant, The City of Los Angeles, passed and adopted on the Seventh day of March, 1917, or any part thereof;

Now, therefore, in accordance with the terms of said Decree, we do strictly command and enjoin you and each of you, your agents, attorneys, servants, employees, successors in office or assigns, or either or any of them, and all persons whomsoever, from in any wise or in any manner enforcing, attempting to enforce, acting under, or carrying or attempting to carry into effect as to or against Los Angeles Gas and Electric Corporation, any of the provisions of said purported Ordinance of the City of Los Angeles, passed and adopted on the Seventh day of March, 1917, numbered 36125 (New Series).

Herein fail not at your peril.

Witness, the Honorable Benjamin F. Bledsoe, United States District Judge, for the Southern District of California, and the seal of said District Court, at Los Angeles, this 16th day of June, A. D. One thousand nine hundred and seventeen, and of our Independence the One hundred and forty-first.

[SEAL.] WM. M. VAN DYKE,
Clerk United States District Court
for the Southern District of California.
By T. F. GREEN, *Deputy Clerk.*

Return on Service of Writ.

ITED STATES OF AMERICA,
Sou. District of Cal., ss:

I hereby certify and return that I served the annexed Writ of junction on the therein-named City of Los Angeles a Municipal rporation, et al. by handing to and leaving a true and correct by thereof with F. T. Woodman, Mayor; J. L. Butler, Chief of lice; Lorin A. Handley, President Board of Public Works, R. F. l Valle, President Board of Public Service Commission and M. Betkouski, President of City Council of said City personally at s Angeles in said District on the 18th day of June, A. D. 1917.

C. T. WALTON, *U. S. Marshal,*
By W. E. CAVANAUGH, *Deputy.*

Received Jun- 18, 1917, M. U. S. Marshal's Office, Los Angeles, Cal.

(Endorsed:) (Original.) Marshal's Civil Docket No. 3367. No. 23 Equity. United States District Court, Southern District of lifornia, Southern Division. Los Angeles Gas and Electric Corration, a Corporation, Complainant, vs. The City of Los Angeles, Municipal Corporation, et al., Defendants. Writ of Injunction. led Jun- 20, 1917. Wm. M. Van Dyke, Clerk, by R. S. Zimmerin, Deputy Clerk.

In the District Court of the United States in and for the Southern District of California, Southern Division.

No. D-23. In Equity.

s ANGELES GAS & ELECTRIC CORPORATION, a Corporation, Complainant,

vs.

HE CITY OF LOS ANGELES, a Municipal Corporation, et al., Defendants.

tition for Allowance of Appeal to the Supreme Court of the United States.

o the Honorable Benjamin F. Bledsoe, District Judge, and one of the Judges of the above named Court, Presiding therein:

The above named defendants, feeling aggrieved by the decree ndered and entered by the above named court in the above entitled tion, on June 15, 1917, hereby appeal from said decree to the upreme Court of the United States for the reasons and upon the rounds set forth in the Assignment of Errors filed herewith, and

they pray that their appeal be allowed, and that citation be issued as provided by the law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States, sitting at Washington, D. C., under the rules of such court in such cases made and provided.

And your petitioner further prays that the proper order relating to the security to be required of them be made.

Dated this 23rd day of August, 1917.

ALBERT LEE STEPHENS,
WM. B. HIMROD,
LEWIS E. WHITEHEAD,
W. B. MATHEWS,
Solicitors for Defendants.

206 (Endorsed:) No. D-23. In the District Court of the United States in and for the Southern District of Cal., Southern Division. Los Angeles Gas & Electric Corporation, a corporation, Complainant, vs. The City of Los Angeles, a municipal corporation, et al., Defendants. Petition for Allowance of Appeal to the Supreme Court of the United States. Filed Aug. 27, 1917. Wm. M. Van Dyke, Clerk, by Chas. N. Williams, Deputy Clerk. Albert Lee Stephens City Attorney, 300 Hosfield Bldg., Los Angeles, Cal., W. B. Mathews, Knickerbocker Bldg., Attorney- for defendants.

207 In the District Court of the United States in and for the Southern District of California, Southern Division.

In Equity.

No. D-23.

LOS ANGELES GAS & ELECTRIC CORPORATION, a Corporation, Complainant,

vs.

THE CITY OF LOS ANGELES, a Municipal Corporation, Defendants.

Assignment of Errors.

Come now the defendants and file the following Assignment of Errors upon which they will rely upon their prosecution of their appeal from the decree made by this Honorable Court on June 15, 1917, in the above entitled cause.

The Court erred:

I.

In making and rendering a decree in said cause ordering, adjudging and decreeing that the ordinance of the City of Los Angeles numbered 36,125 (New Series), and being Exhibit "D" attached to

he Bill of Complaint in said action, is illegal, invalid, null, void nd of no force or effect; a copy of which ordinance is as follows, o-wit:

Ordinance No. 36,125.

(New Series.)

An Ordinance providing for the removal or relocation of poles and other properties located in public streets and other public places of the City of Los Angeles, when necessary in order that the municipal electrical street lighting system may be constructed, operated and maintained therein.

Whereas, the public peace, health and safety demand the construction and establishment by The City of Los Angeles of an electrical system, whereby the public streets and other public places of said city may be lighted, and, to that end, it is necessary that pole and wire lines, street lamps and fixtures, nd other incidental appliances, should be installed in the public treets and public places of said city as speedily as may be practiable; and,

Whereas, various persons, firms and corporations are maintaining in the public streets and other public places of said city, poles, nchors, cross arms, wires, street lamps and other fixtures, appliances nd structures, and it is necessary, in order that sufficient space may e secured for said municipal electrical system in said public streets nd public places, and that the work of constructing and establishng the same may be carried on, to provide for the removal or relocaion of certain of said poles and other properties so maintained by aid persons and corporations. Therefore:

The Mayor and Council of The City of Los Angeles do ordain as ollows:

Section 1. That whenever it shall appear to the Board of Public Works of said City that the removal or relocation of any pole, nchor, cross arm, wire, street lamp, or any other fixture, appliance r structure, owned or controlled by any person, firm or corporation, nd located in, upon, over or under any public street or public place f said city, is necessary in order that the Municipal Electrical Street Lighting System of said city, or any part thereof, may be erected, perated or maintained in such public street or public place, then aid Board shall give notice in writing to the person, firm or corporaion owning or controlling said pole or other property, located as foresaid, to remove or relocate the same; that such notice shall state the number and location of the poles, anchors, cross arms, wires, street lamps, or other fixtures, appliances or structures, to be removed or relocated, and, then relocation of any such oles, anchors, cross arms, wires, street lamps, or other fixtures, apliances or structures, is required in such notice, then such notice hall designate the location in, upon, over or under any such public treet or other public place to which the same shall be removed; and t shall be the duty of such person, firm or corporation to begin,

within five (5) days after the giving of such notice, the work of removing or relocating the poles, anchors, cross arms, wires, street lamps, or other fixtures, appliances or structures designated in such notice, and to prosecute such work diligently to completion.

Sec. 2. It shall be unlawful for any person, form or corporation owning or controlling any pole, anchor, cross arm, wire, street lamp, or any other fixture, appliance or structure located in, upon, over or under any public street or other public place in the City of Los Angeles, to fail or refuse to begin the work of removing or relocating such pole, anchor, cross arm, wire, street lamp, fixture, appliance or structure within five (5) days after receiving notice in writing from the Board of Public Works of said city so to do, as provided in Section 2 of this ordinance.

Sec. 3. It shall be unlawful for any person, firm or corporation owning or controlling any pole, anchor, cross arm, wire, street lamp, or any other fixture, appliance or structure located in, upon, over or under any public street or other public place in the City of Los Angeles, to neglect or refuse, after five (5) days' notice in writing from the Board of Public Works of said City to said person, firm or corporation, as provided in Section 2 of this ordinance, to remove or relocate any such pole, anchor, cross arm, wire, street lamp,
210 fixture, appliance or structure to diligently prosecute such removing or relocating to completion.

Sec. 4. That any person, firm or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punishable by a fine of not more than Five Hundred Dollars ($500.) or by imprisonment in the City Jail for a period of not more than six (6) months, or by both such fine and imprisonment.

Each such person, firm or corporation shall be deemed guilty of a separate offense for every day during any portion of which any violation of any provision of this ordinance is committed, continued or permitted by such person, firm or corporation, and shall be punishable therefor — provided by this ordinance.

Sec. 5. That said Board of Public Works, or the Board, commission or officer of said city having in charge the construction and establishment of said municipal electrical system, shall have power to move or relocate any pole, anchor, cross arm, wire, street lamp, or any other fixture, appliance or structure, owned and controlled by any person, form or corporation in a public street or public place in said city, where such person, firm or corporation shall fail, within five (5) days after receipt of notice, as aforesaid, to begin the work of removing or relocating the same, or shall fail to diligently prosecute such work to completion.

Sec. 6. That said city is now engaged in the construction of an electrical system for lighting the public streets and other public places of said city; that said city has heretofore been compelled to depend on contracts with private utility corporations for furnishing lighting for such public streets and public places and some of said contracts have already expired and all of said contracts will have
211 expired by July 1, 1917, and the completion of said municipal system is necessary in order that said city may be able

provide for lighting its public streets and other public places without interruption; that the removal and relocation of certain poles, anchors, cross arms, wires, street lamps and other fixtures, appliances and structures, owned or controlled by various persons, firms or corporation- and located in said public streets and other public places of said city, are immediately necessary in order that the city may *be* complete and install its said electrical system; therefore, this ordinance is urgently required for the immediate preservation of the public peace, health and safety; and the City Clerk shall certify to its passage by a unanimous vote, and cause the same to be published once in The Los Angeles Daily Journal and thereupon and thereafter it shall take effect and be in force.

I hereby certify that the foregoing ordinance was passed by the Council of the City of Los Angeles by the unanimous vote of all the members of said Council present, there being not less than seven members present, at its meeting of March 6, 1917.

CHAS. L. WILDE, *City Clerk.*

Approved this 7 day of March, 1917.

F. T. WOODMAN, *Mayor.*

II.

In making and rendering a decree in said cause ordering, adjudging, decreeing and declaring that the notice, dated March 24, 1917, addressed to complainant Los Angeles Gas & Electric Corporation, from the Board of Public Works of the City of Los Angeles, a copy of which notice is set forth in paragraph XX of said bill of complaint, is invalid, void and inoperative; of which notice a copy is as follows, to-wit:

212 March 24, 1917.

Los Angeles Gas & Electric Corporation, Los Angeles, Cal.

GENTLEMEN: At a meeting of the Board of Public Works of Los Angeles, California, held March 24, 1917, you were directed to make the following changes in the elevation of your wires, cross arms, etc., on York Boulevard, to-wit:

Armadale Avenue and York Boulevard, remove old pole top fixture from top of your pole No. 18595-G and lower your wires taking any position you may desire below 41 feet above curb line.

York Boulevard and Avenue 49, remove old pole top fixture from top of your pole No. 18596-G and lower your wires, taking any position you may desire below 41 feet above curb line.

York Boulevard and Avenue 50, remove pole top fixture from pole No. 18597-G. Lower wires on York Blvd. on Pole No. 18597-G to 41 ft. 6 in. level. Lower wires on No. 18597-G running south on Avenue 50 to any level between 41 ft. 6 in. and 39 ft. 6 inch. Place your wires on pole No. 4263-M on present city arm at 41 ft. 4 in. level.

York Boulevard and Avenue 51, remove old pole top fixture from your pole No. 18599-G, and lower your wires to any position below 40 feet above the curb line.

York Boulevard and Avenue 52, lower your wires on your pole No. 18600-G to any position below 41 feet above curb line.

York Boulevard and Avenue 53; lower line arm on pole No. 18601-G to the 36 ft. 6 in. level using the 34 ft. 6 in. level for buck arm for wires running north on Avenue 53.

This order is given pursuant to the provisions of Ordinance No. 36,125 New Series, which provides that the work of removal and relocation shall be commenced within a period of 5 days from the receipt of this notice and prosecuted diligently to comple-
213 tion.

Yours very truly,

BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES,

By LORIN A. HANDLEY, *President*,

By HORANCE B. FERRIS, *Secretary*.

III.

In making and rendering a decree in said cause ordering, adjudging and decreeing that the defendants in said cause be perpetually enjoined and restrained from in any wise or in any manner enforcing, acting under or carrying or attempting to carry into effect, as against said complainant, any of the provisions of said ordinance of the City of Los Angeles numbered 36125 (New Series), or any part thereof.

IV.

In making and rendering a decree in said cause ordering, adjudging and decreeing that a writ of permanent injunction be issued in said cause, perpetually enjoining and restraining said defendants, their officers, agents, servants, attorneys or employees, from in any wise or in any manner, enforcing, acting under or carrying or attempting to carry into effect, as to or against said complainant, any or all of the provisions of said ordinance of the City of Los Angeles numbered 36125 (New Series), or any part thereof.

V.

In holding and deciding that said ordinance and said notice are, and each of them is, unjust, unreasonable, arbitrary, confiscatory, and contrary to and in violation of Section 1 of Article V of the Constitution of the United States.

214 VI.

In holding and deciding that by said ordinance and said notice, or either of them, the property and rights of complainant are taken by the

l defendants without just compensation, and that the complainant hereby deprived of its property and rights without due process of , in violation of Section 1 of Article V of the Constitution of the ited States.

VII.

In holding and deciding that said ordinance and said notice are, l each of them is, null, void, illegal, unlawful, contrary to and in lation of Section 1 of Article IV of the Constitution of the United ates.

VIII.

In holding and deciding that by said ordinance and said notice, or her of them, complainant is deprived of its property without due ocess of law, and is denied the equal protection of the laws, in lation of Section 1 of Article IV of the Constitution of the United ates.

IX.

In holding and deciding that said ordinance is violative of and pro-bited by the provisions of the 14th amendment of the Constitution the United States, prohibiting any state from making or enforcing y law which shall abridge the privileges or immunities of citizens the United States, or the provisions of said amendment forbidding y state from depriving any person of life, liberty or property with-t due process of law, or from denying to any person within its risdiction the equal protection of the laws.

X.

In holding and deciding that said ordinance is violative of the provision of the Constitution of the United States forbidding any state to pass any law impairing the obligation of contracts.

XI.

In holding and deciding that the defendants threaten and intend , and unless restrained and enjoined by the order of the court, will, nder the authority of said ordinance, in every case where the poles, ires, apparatus or appliances of complainant erected and maintained y it upon the public streets, thoroughfares and places of said City of os Angeles, and used by complainant for the distribution and sup-lying of electrical energy for light, are situate in an advantageous, onvenient or economical situation or location, which is envied, oveted or desired by defendants for the purpose of more conveni-ntly or economically establishing or maintaining an electrical dis-ributing system for the distribution by the City or its Board of Pub-e Service Commissioners of electrical energy to private consumers, nd more advantageously and effectively competing with complain-

ant by ousting it from and supplanting it in locations upon said streets, places and thoroughfares that are most valuable, advantageous and necessary to complainant for carrying on its said business, to order and direct complainant under said ordinance to remove from said locations, said poles, wires, apparatus or appliances, and in the event of its failure or refusal to comply with such order and direction, and unless restrained and enjoined by order of court, will themselves remove from their locations such poles, wires and apparatus of complainant by force, or that complainant will thereby suffer irreparable loss, damage or injury.

XII.

In holding and deciding that the directions given and intended to be given by defendants under said ordinance, as alleged in the
216 bill of complaint, are in violation of the 14th amendment of the Constitution of the United States, prohibiting any state from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or the provisions of said amendment forbidding any state from depriving any person of life, liberty or property without due process of law, or from denying to any person within its jurisdiction the equal protection of the laws.

XIII.

In holding and deciding that no public necessity has been shown to exist justifying the adoption or enforcement of said ordinance, and on that ground declaring the same null and void.

XIV.

In holding and deciding that said ordinance was not passed or adopted as a police measure, or in the lawful exercise of the police powers of said City.

XV.

In holding and deciding that said ordinance and said notice are, and each of them is, invalid, illegal, and of no lawful force or effect, for the reason that the same are, and each of them is, and unlawful, arbitrary and confiscatory attempted exercise of the police power lawfully vested in said municipality for the design, purpose and intent of securing said city, acting in a proprietary capacity and exercising a proprietary function, the rights, property and franchises of complainant without compensation to complainant, and without the exercise of the power of eminent domain vested in said municipality.

XVI.

In holding and deciding that said ordinance and said notice are, and each of them is, illegal and void, for the — that they are,

7 and each of them is, contrary to and in violation of Section 14 of Article I of the Constitution of the State of California, that the private rights and property of complainant are taken by fendants without just compensation having first been made to, or id into court for complainant.

XVII.

That said ordinance is invalid, illegal and of no force or effect, the ground that the same delegates, or attempts to delegate, to e Board of Public Works of the City of Los Angeles functions, au- ority and discretion which can lawfully be exercised only by the uncil of said City.

Wherefore, appellants pray that said decree be reversed, and that d District Court, in and for the Southern District of California, uthern Division, be ordered to enter a decree refersing the decision the lower court in said cause.

ALBERT LEE STEPHENS,
City Attorney.
LEWIS E. WHITEHEAD,
WM. B. HIMROD,
W. B. MATHEWS,
Solicitors for Appellants.

(Endorsed:) No. D-23. In the District Court of the United States and for the Southern District of California, Southern Division. s Angeles Gas & Electric Corporation, a corporation, Complainant The City of Los Angeles, a municipal corporation, et al., De- ndants. Assignment or Errors. Filed Aug. 27, 1917. Wm. M. n Dyke, Clerk, by Chas. N. Williams, Deputy Clerk. Albert e Stephens, City Attorney, 300 Hosfield Bldg., Los Angeles, Cal., B. Mathews, Knickerbocker Bld., Attorney- for Defendants.

8 In the District Court of the United States in and for the Southern District of Colifornia, Southern Division.

No. D-23. In Equity.

s Angeles Gas & Electric Corporation, a Corporation, Complainant,

vs.

e City of Los Angeles, a Municipal Corporation, et al., Defendants.

Order Allowing Appeal.

On motion of W. B. Mathews, Esq., solicitor and counsel for de- ndants, it is hereby ordered that an appeal to the Supreme Court

of the United States from the decree heretofore filed and entered herein be, and the same is hereby allowed, and that a certified transcript of the records, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of $250.00.

Dated August 27th, 1917.

BENJAMIN F. BLEDSOE,
Judge of the District Court.

(Endorsed:) No. D-23. In the District Court of the United States in and for the Southern District of California, Southern Division. Los Angeles Gas & Electric Corporation, a corporation, Complainant vs. The City of Los Angeles, a municipal corporation, et al., Defendants. Order Allowing Appeal. Filed Aug. 27, 1917. Wm. M. Van Dyke, Clerk, by Chas. N. Williams, Deputy Clerk. Albert Lee Stephens, City Attorney, 300 Hosfield Bldg., Los Angeles, Cal., W. B. Mathews, Knickerbocker Bld., Attorney- for Defendants.

219 Fidelity and Deposit Company of Maryland,

Home Office: Baltimore, Maryland.

In the District Court of the United States in and for the Southern District of California, Southern Division.

No. D-23. In Equity.

Los Angeles Gas & Electric Corporation, a Corporation, Complainant,

vs.

The City of Los Angeles, a Municipal Corporation, et al., Defendants.

Undertaking on Appeal.

Whereas on the 15th day of June, 1917 judgment was rendered by the above entitled Court in the above entitled Action in favor of the Complainant and against the defendants therein, and

Whereas the Defendants desire to appeal from said judgment and have taken an appeal to the Supreme Court of the United States to reverse the judgment and decree of the District Court of the United States in and for the Southern District of California Southern Division;

Now therefore, in consideration of the premises and of the taking of said appeal the undersigned Fidelity and Deposit Company of Maryland, a corporation duly organized under the laws of the State of Maryland and having complied with all the regulations of the United States of America relative to the execution and filing

bonds, stipulations and undertakings in the Courts of the United ates of America, does undertake, promise and acknowledge itself nd in the sum of Two Hundred and Fifty ($250.00) Dollars vful money of the United States of America to the effect that d Defendants shall prosecute their appeal to effect, and answer costs if they fail to make their plea — and shall pay all costs which may be assessed against them on the appeal or on a dismissal 0 thereof.

In witness whereof the said Fidelity and Deposit Company of aryland has hereunto caused its name and corporate seal to be ixed by its duly authorized officers at Los Angeles, California this th day of August, 1917.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND, [SEAL.]
By W. M. WALKER, *Attorney-in-fact.*

Attest:
[SEAL.] S. T. MacCUBBIN, *Agent.*

The Foregoing Undertaking is hereby approved both as to form d sufficiency this 28th day of August, 1917.

TRIPPET, *Judge.*

Approved.
BLEDSOE, *Judge.*

9/17/17.

ATE OF CALIFORNIA,
County of Los Angeles, ss:

On this 28th day of August, 1917, before me C. M. Evarts, a otary Public in and for the said County of Los Angeles, State of alifornia, residing therein, duly commissioned and sworn, personly appeared W. M. Walker, known to me to be the Attorney in ct, and S. T. Maccubbin, known to me to be the Agent of the delity and Deposit Company of Maryland, the Corporation that ecuted the within instrument, and acknowledged to me that they bscribed the name of the Fidelity and Deposit Company of aryland thereto and their own names as Attorney in Fact and gent, respectively.

[SEAL.] C. M. EVANS,
Notary Public in and for the County of
Los Angeles, State of California.

Surety Co. O. K.
WM. M. VAN DYKE, *Clerk,*
By R. S. ZIMMERMAN, *Deputy.*

21 (Endorsed:) D 23. Equity. Surety Bonds. Los Angeles Gas & Elec. Corporation vs. City of Los Angeles et al. ndertaking on Appeal. Filed Sept. 17, 1917. Wm. M. Van

Dyke, Clerk, by Chas. N. Williams, Deputy Clerk. Department
Southern California, H. W. Hellman Bldg., Los Angeles, Ca
Fidelity and Deposit Company of Maryland, Baltimore, Marylan

222 In the District Court of the United States for the Southe
District of California, Southern Division.

D-23. In Equity.

LOS ANGELES GAS & ELECTRIC CORPORATION, Complainant,

vs.

THE CITY OF LOS ANGELES, a Municipal Corporation, Defendan
and Appellants.

Stipulation for Removal of Exhibits from Files.

It is hereby Stipulated by and between counsel for the co
plainant and counsel for the defendants, that any and all exhibi
filed on behalf of either party in the above-entitled action and
the trial thereof, may, for the purpose of this appeal, be remov
from the files, and transmitted to the Supreme Court at Washingto
D. C., as part of the record on appeal in the above-entitled action.

Dated this 17 day of October, 1917.

H. C. BEACH,
PAUL OVERTON,
HERBERT J. GOUDGE,
Attorneys for Complainant.
ALBERT LEE STEPHENS,
W. B. MATHEWS,
WM. B. HIMROD,
LEWIS E. WHITEHEAD,
Attorneys for Defendants & Appellants.

223 (Endorsed:) No. D-23. In Equity. In the District Cou
of the United States for the Southern District of Californi
Southern Division. Los Angeles Gas & Electric Corporation, Co
plainant, vs. The City of Los Angeles, a municipal corporation, D
fendants and Appellants. Stipulation for removal of exhibits fro
files. Filed Oct. 18, 1917. Wm. M. Van Dyke, Clerk, by Chas.
Williams, Deputy Clerk. Albert Lee Stephens, City Attorney, Me
chants' Trust Bldg., Los Angeles, W. B. Mathews, Knickerbock
Bdg., Attorney- for Defendants & Appellants.

224 In the District Court of the United States for the Southern District of California, Southern Division.

In Equity.

D-23.

LOS ANGELES GAS & ELECTRIC CORPORATION, Complainant,

vs.

THE CITY OF LOS ANGELES, a Municipal Corporation, Defendants and Appellants.

Order Allowing Removal of Exhibits.

It appearing to the Honorable Court that stipulation has heretofore been entered into and filed by and between the counsel for the complainants and the counsel for the defendants in the above entitled action, providing for the removal of any and all exhibits filed on behalf of either party in the above-entitled action, from the files, to be transmitted as part of the record on appeal to the Supreme Court at Washington, D. C., and good cause appearing therefor,

It is hereby ordered that permission be granted to remove any and all exhibits filed at the trial of said action on behalf of either of the parties thereto, for the purpose of transmitting same to the Supreme Court of the United States at Washington, D. C., as part of the record on appeal in the above-entitled action.

BLEDSOE,

Judge of the District Court of the United States.

225 (Endorsed:) No. D-23. In Equity. In the District Court of the United States for the Southern District of California, Southern Division. Los Angeles Gas & Electric Corporation, complainant, vs. The City of Los Angeles, a municipal corporation, Defendants and Appellants. Order allowing removal of exhibits. Filed Oct. 18, 1917. Wm. M. Van Dyke, Clerk, by Chas. N. Williams, Deputy Clerk. Albert Lee Stephens, City Attorney, 300 Hosfield Bldg., Los Angeles, Cal., W. B. Mathews, Knickerbocker Bdg., Attorney- for Defendants and Appellants.

226 In the District Court of the United States, Southern District of California.

In Equity.

D-23.

LOS ANGELES GAS & ELECTRIC CORPORATION, Complainant,

vs.

THE CITY OF LOS ANGELES, a Municipal Corporation, Defendants and Appellants.

Precipe.

To the clerk of said court:

SIR: Please issue in the above-entitled action, in the form of a transcript of the proceedings, the following papers, to wit:

The Bill of Complaint filed herein, the Order to Show Cause, and the affidavits filed in connection therewith; the Answer to the Bill of Complaint filed by the Defendants, the Statement of the Evidence filed on behalf of Appellants herein, and approved by the Court, all exhibits filed in said action, the opinion of the Honorable Court, the Judgment filed and entered herein, the Writ of Injunction issued in accordance with the judgment, Petition for Allowance of Appeal in the Supreme Court of the United States, the Assignment of Errors filed on behalf of the Defendants, the order allowing Appeal, the Bond on Appeal, and the Citation on Appeal.

ALBERT LEE STEPHENS,
City Attorney.
W. B. MATHEWS,
WM. B. HIMROD,
LEWIS E. WHITEHEAD,
Attorneys for Defendants and Appellants.

227 (Endorsed:) No. D-23. In Equity. In the District Court of the United States, Southern District of California. Los Angeles Gas & Electric Corporation, Complainant, vs. The City of Los Angeles, a municipal corporation, Defendants and Appellants. D-23. Precipe. Filed Oct. 18, 1917. Wm. M. Van Dyke, Clerk, by Chas. N. Williams, Deputy Clerk. Received copy of the within this 25th day of Sept., 1917. H. C. Beach & Herbert J. Goudge, Paul Overton, by Thurston, Attorneys for complainants. Albert Lee Stephens, City Attorney, 300 Hosfield Bldg., Los Angeles, Cal., W. B. Mathews, Knickerbocker Bdg., Attorneys for Defendants & Appellants.

228 In the District Court of the United States of America in and for the Southern District of California, Southern Division.

No. D-23. Equity.

LOS ANGELES GAS AND ELECTRIC CORPORATION, a Corporation, Complainant,

vs.

THE CITY OF LOS ANGELES, a Municipal Corporation; FREDERICK T. WOODMAN, as Mayor of The City of Los Angeles; Board of Public Works of The City of Los Angeles, and Lorin A. Handley, Patrick P. O'Brien, and Owen McAleer, Members of and Constituting the Board of Public Works of The City of Los Angeles; Department of Public Service of the City of Los Angeles and Reginald F. Del Valle, Louis H. Valentine, Meredith P. Snyder, John W. Kemp, and Bryon Erkenbrecher, Members of and Constituting the Board of Public Service Commissioners of The City of Los Angeles; the Council of The City of Los Angeles and Martin F. Betkouski, James S. Conwell, Frederick C. Langdon, Estelle Lawton Lindsey, Robert T. Brain, William A. Roberts, Foster C. Wright, Fred C. Wheeler, and John Topham, as Members of and Constituting the Council of The City of Los Angeles; John L. Butler, Chief of Police of The City of Los Angeles, and Ezra F. Scattergood, Chief Electrical Engineer of The Bureau of Power and Light of The City of Los Angeles, Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing two hundred and twenty-seven (227) typewritten pages, numbered from 1 to 227 inclusive and comprised in one volume, to be a full, true and correct copy of the Bill of Complaint, Affidavit of C. A. Luckenbach, Affidavit of E. R. Northmore, Order to Show Cause and Temporary Restraining Order, Answer of Defendants to Bill of Complaint, Statement of Evidence, Opinion of Court, Decree, Writ of Injunction, Petition for Allowance of Appeal, undertaking on Appeal, Stipulation and Order for Removal of
229 Exhibits from Files, Praecipe of Transcript of Record on Appeal in the above and therein entitled cause and that the same together constitute the record on appeal in said cause as specified in the said Praecipe filed in my office on behalf of the appellants by its Solicitors of record.

I do further certify that the cost of the foregoing record is $110.00, the amount whereof has been paid me by the Appellants.

In testimony whereof I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and

for the Southern District of California, this 27th day of October in the year of our Lord one thousand nine hundred and seventeen and of our Independence the one hundred and forty-second.

[Seal of the U. S. District Court, Southern Dist. of California.]

WM. M. VAN DYKE,
Clerk of the District Court of the United States of America in and for the Southern District of California.

Endorsed on cover: File No. 26,227. S. California D. C. U. S. Term No. 760. The City of Los Angeles et al., appellants, vs. Los Angeles Gas & Electric Corporation. Filed November 12th, 1917. File No. 26,227.

No. 2[redacted]50

IN THE

SUPREME COURT

OF THE

UNITED STATES.

The City of Los Angeles, et al.,
Appellants,

vs.

Los Angeles Gas & Electric Corporation,
Appellee.

BRIEF FOR APPELLANTS.

ALBERT LEE STEPHENS,
City Attorney.

W. B. MATHEWS,
Attorneys for Appellants.

Parker & Stone Co., Law Printers, 332 West Sixth St., Los Angeles

No. 2[illegible]50

IN THE

SUPREME COURT

OF THE

UNITED STATES.

The City of Los Angeles, et al.,
Appellants,

vs.

Los Angeles Gas & Electric Corporation,
Appellee.

BRIEF FOR APPELLANTS.

ALBERT LEE STEPHENS,
City Attorney.

W. B. MATHEWS,
Attorneys for Appellants.

Parker & Stone Co., Law Printers, 332 New High St., Los Angeles

INDEX.

I.

PAGE

Statement of the Case..... 4

1. The Pleadings 4

2. The Decision 16

3. The Questions Involved and the Manner in Which They Are Raised 18

4. Specification of Errors Relied Upon 20

II.

Brief of the Argument..... 21

1. Order Was in Conformity With Conditions Attached to Franchise 21–27

2. Ordinance and Order Are Valid Exercise of Police Power..... 22–33

(a) Company Is Subject to Reasonable Police Regulations 22–33

(b) The Regulatory Measures Are Presumed to Be Reasonable... 23–37

(c) Failure to Plead or Prove Facts Showing Ordinance and Order Are Arbitrary, Unreasonable or Confiscatory 23–39

PAGE

(d) Assumption of District Court That Question of Public Necessity Was for Determination of That Court 23–52

(e) Holding of District Court That Company Is Protected Against Regulatory Measures by Principle, "First in Time Is First in Right" 24–55

3. Error in Holding That Ordinance and Order Impair the Obligation of a Contract 24–59

4. Error in Holding That Ordinance and Order Deprive the Company of Property and Rights Without Due Process of Law, in Violation of 14th Amendment of U. S. Constitution 25–61

5. Error in Holding That Ordinance and Order Deny Equal Protection of the Laws, in Violation of 14th Amendment of U. S. Constitution 25–63

6. Error in Holding That Ordinance and Order Violate 5th Amendment of the U. S. Constitutoin...26-64

7. Error in Holding That Ordinance and Order Constitute Taking or

PAGE

Damaging of Private Property for Public Use Without Just Compensation, in Violation of Sec. 14, of Art. I. of the Constitution of California.....26–66

8. Error in Holding That Ordinance Constitutes Attempt to Delegate Legislative Power 27–69

AUTHORITIES RELIED UPON.

Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. Ed. 721.....60–62–68

Buttfield v. Stranahan, 192 U. S. 470.... 70

Charter of Los Angeles, Sec. 52-a..... 29

" " " " Sec. 146 29

" " " " Sec. 2 35–52

" " " " Sec. 31 35

" " " " Sec. 36-e 36

" " " " Sec. 36-f 36

Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. Ed. 1204.....61-62-66

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. Ed. 596.....42–63–68

City of Mitchell v. Dak. Cen. Tel. Co., (S. D.) 127 N. W. 582..... 32

City of Portland v. Montgomery, 62 Pac. (Or.) 755 37

Constitution of California, Sec. 8 of Art. XI 34

PAGE

Constitution of California, Sec. 11 of Art. XI 34
Constitution of California, Sec. 19 of Art. XI 27–52
Cooley on Constitutional Lim., 257, 258 (7th Ed.) 40
Cumberland Tel. & Tel. Co. v. Louisville Home Tel. Co., 72 S. W. (Ky.) 4 42
Curtis on the Law of Electricity, Sec. 223. 31
Dillon on Mun. Cor., 5th Ed., Sec. 591 . . . 38
" " " " " " Sec. 649 . . . 38
" " " " " " Sec. 1269 . . 34
Elliott on Roads & Streets, 3rd Ed., Sec. 939 34
Elliott on Roads & Streets, 3rd Ed., Sec. 1066 36
Ex Parte Fiske, 72 Cal. 125 72
Ex Parte Haskell, 112 Cal. 412 38–51
Field v. Clark, 143 U. S. 649 69
Grand Trunk W. R. Co. v. South Bend, 227 U. S. 544, 57 L. Ed. 633 60
Harbor Com'rs. v. Excelsior Redwood Co., 88 Cal. 491 73
Hunter v. Pittsburgh, 207 U. S. 161 65
Knight v. United Land Ass'n., 142 U. S. 161, 35 L. Ed. 974 30
Lewis on Eminent Domain, Sec. 248 (3rd Ed.) 69

PAGE

Lloyd v. Dollison, 194 U. S. 445..... 65
Louisville Home Tel. Co. v. Cumberland Tel. & Tel. Co., 111 Fed. 663.....41–56
Merced Falls Gas etc. Co. v. Turner, 2 Cal. App. 720 36–55–66
Michigan Tel. Co. v. City of Charlotte, 93 Fed. 11 58–61
Miller v. City of Fitchburg, 61 N. E. (Mass.) 277 53
New Orleans Gas Light Co. v. Drainage Com'n., 197 U. S. 453, 49 L. Ed. 831.. 67
People v. Stokes, 118 N. E. (Ill.) 87..... 37
Platt v. City and County of San Francisco, 158 Cal. 74 54
Revere Water Co. v. Inhabitants of Town of Winthrop, 78 N. E. (Mass.) 497... 53
Slaughter House Cases, 16 Wall. 36, 62; 21 L. Ed. 394, 404..... 61
Soon Hing v. Crowley, 113 U. S. 703, 710 40
Union Bridge Co. v. United States, 204 U. S. 364 71
Western Union Tel. Co. v. Syracuse Elec. L. & P. Co., 178 N. Y. 325..... 41

III.

The Argument 27

IN THE

SUPREME COURT

OF THE

UNITED STATES.

The City of Los Angeles, et al.,
Appellants,

vs.

Los Angeles Gas & Electric Corporation,
Appellee.

BRIEF FOR APPELLANTS.

If the Court Please:

This is an appeal from a decree of the District Court for the Southern District of California, adjudging Ordinance No. 36,125 (New Series) of the city of Los Angeles, in that state, to be violative of the Constitution of the United States and void, and perpetually enjoining the enforcement thereof.

I.

STATEMENT OF THE CASE.

1. The Pleadings.

The Los Angeles Gas & Electric Corporation, complainant in the court below and to which we shall hereinafter refer as "The Company," is now, and, since August 1, 1909, has been, engaged in the business of generating, distributing and selling electric energy for domestic, commercial and public uses in the city of Los Angeles, and, in connection with such business, is and has been operating and maintaining, under franchises granted pursuant to the Constitution of California, a system of poles and wires and other works in the public streets of that city, including what is referred to in the record as York Boulevard, for conveying and delivering such energy to its consumers. The number of such consumers is approximately forty thousand, and the value of complainant's property employed in such public service exceeds seven millions of dollars. [Tr. fols. 13-16.]

Appellants, who were defendants in the court below, are the municipality, its Mayor, Board of Public Works, Board of Public Service Commissioners, the members of such boards, and various other officials of the municipality.

Parties to this suit are all citizens and residents of the Southern District of California. [Tr. fols. 8-12.]

The ordinance referred to was adopted by the council of Los Angeles on March 6, 1917, and was approved by the mayor March 7, 1917 [Tr. fols. 43-6], and the following is a copy thereof:

> "An ordinance providing for the removal or relocation of poles and other properties located in public streets and other public places of the city of Los Angeles, when necessary in order that the municipal electrical street lighting system may be constructed, operated and maintained therein.
>
> "Whereas, the public peace, health and safety demand the construction and establishment by the city of Los Angeles of an electrical system whereby the public streets and other public places of said city may be lighted, and, to that end, it is necessary that pole and wire lines, street lamps and fixtures, and other incidental appliances, should be installed in the public streets and public places of said city as speedily as may be practicable; and,
>
> "Whereas, various persons, firms and corporations are maintaining in the public streets and other public places of said city, poles, anchors, cross arms, wires, street lamps and other fixtures, appliances and structures, and it is necessary, in order that sufficient space may be secured for said municipal electrical system in said public streets and public places, and that the work of constructing and establishing

the same may be carried on, to provide for the removal or relocation of certain of said poles and other properties so maintained by said persons and corporations; therefore,

"The mayor and council of the city of Los Angeles do ordain as follows:

"Section 1. That whenever it shall appear to the Board of Public Works of said city that the removal or relocation of any pole, anchor, cross arm, wire, street lamp, or any other fixtures, appliance or structure, owned or controlled by any person, firm or corporation, and located in, upon, over or under any public street or public place of said city, is necessary in order that the municipal electrical street lighting system of said city, or any part thereof, may be erected, operated or maintained in such public street or public place, then said board shall give notice in writing to the person, firm or corporation owning or controlling said pole or other property, located as aforesaid, to remove or relocate the same; that such notice shall state the number and location of the poles, anchors, cross arms, wires, street lamps, or other fixtures, appliances or structures, to be removed or relocated, and, when relocation of any such poles, anchors, cross arms, wires, street lamps, or other fixtures, appliances or structures, is required in such notice, then such notice shall designate the location in, upon, over or under any such public street or other public place to which the same shall be removed; and it shall be the duty of such person, firm or corporation to begin, within five (5) days after the giving of such notice, the work of removing or relocating the poles, anchors,

cross arms, wires, street lamps, or other fixtures, appliances or structures designated in such notice, and to prosecute such work diligently to completion.

"Sec. 2. It shall be unlawful for any person, firm or corporation owning or controlling any pole, anchor, cross arm, wire, street lamp, or any other fixtures, appliance or structure located in, upon, over or under any public street or other public place in the city of Los Angeles, to fail or refuse to begin the work of removing or relocating such pole, anchor, cross arm, wire, street lamp, fixture, appliance or structure within five (5) days after receiving notice in writing from the Board of Public Works of said city so to do, as provided in section 2 of this ordinance.

"Sec. 3. It shall be unlawful for any person, firm or corporation owning or controlling any pole, anchor, cross arm, wire, street lamp, or any other fixture, appliance or structure located in, upon, over or under any public street or other public place in the city of Los Angeles, to neglect or refuse, after five (5) days' notice in writing from the Board of Public Works of said city to said person, firm or corporation, as provided in section 2 of this ordinance, to remove or relocate any such pole, anchor, cross arm, wire, street lamp, fixture, appliance or structure to diligently prosecute such removing or relocating to completion.

"Sec. 4. That any person, firm or corporation violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction thereof, shall be punishable by a fine of not more than five hundred dollars ($500) or by imprisonment in the city jail for a period

of not more than six (6) months, or by both such fine and imprisonment.

"Each such person, firm or corporation shall be deemed guilty of a separate offense for every day during any portion of which any violation of any provision of this ordinance is committed, continued or permitted by such person, firm or corporation, and shall be punishable therefor as provided by this ordinance.

"Sec. 5. That said Board of Public Works, or the board, commission or officer of said city having in charge the construction and establishment of said municipal electrical system, shall have power to move or relocate any pole, anchor, cross arm, wire, street lamp, or any other fixture, appliance or structure, owned and controlled by any person, firm or corporation in a public street or public place in said city, where such person, firm or corporation shall fail, within five (5) days after receipt of notice, as aforesaid, to begin the work of removing or relocating the same, or shall fail to diligently prosecute such work to completion.

"Sec. 6. That said city is now engaged in the construction of an electrical system for lighting the public streets and other public places of said city; that said city has heretofore been compelled to depend on contracts with private utility corporations for furnishing lighting for such public streets and public places and some of said contracts have already expired and all of said contracts will have expired by July 1, 1917, and the completion of said municipal system is necessary in order that said city may be able to provide for lighting its public streets and other public places without

interruption; that the removal and relocation of certain poles, anchors, cross arms, wires, street lamps and other fixtures, appliances and structures, owned or controlled by various persons, firms or corporations and located in said public streets and other public places of said city, are immediately necessary in order that the city may complete and install its said electrical system; therefore, this ordinance is urgently required for the immediate preservation of the public peace, health and safety."

The company, in locating its structures in the public streets of Los Angeles, selected positions which, as alleged by it, were calculated to serve the best interests of the public and of itself, and placed and installed the same under the direction of the Board of Public Works of Los Angeles, which has control and superintendence of the public streets, places and thoroughfares of that city. [Tr. fols. 14-15.]

In 1916, and subsequent to the construction of the company's pole and wire lines on York boulevard, the city commenced the construction of electric pole and wire lines, constituting part of the municipal electric system of Los Angeles, on and along that boulevard and in close proximity to the company's lines, and such municipal lines were designed and intended to be used, and are being operated and maintained by the city for street lighting purposes, and for sup-

plying electric energy for domestic and commercial uses and purposes at a profit to said city. [Tr. fols. 17-18.]

It is the purpose of the city to extend its municipal electric system so as to secure and serve a large majority of the consumers of electric energy therein, and the city is now, in many localities, in open and active competition with the company. [Tr. fols. 17-18.]

On or about January 25, 1917, the company brought suit against the city in the Superior Court of Los Angeles County, California, to enjoin the city from interfering with or trespassing upon the company's wires, poles or other property, in connection with the construction of the municipal electric system, and from constructing such system in unlawful proximity to the company's system. The state court gave judgment in such action granting an injunction against the city. In such judgment, the city and its officers and agents were restrained from conveying electric energy through municipal lines until they were removed such distance from the company's lines as is prescribed by the laws of California and the regulations of the railroad commission of that state. [Tr. fols. 18-21, 37-9.] The judgment of the state court, which was rendered March 17, 1917, as well as the writ of injunction issued thereunder, contained this provision [Tr. fols. 38-9, 42]:

"Nothing herein contained shall be construed as prohibiting or restraining the city of Los Angeles or its proper boards, officers or agents from carrying into effect any ordinance of said city providing for the removal or relocation of poles, anchors, cross arms, wires, street lamps or other fixtures, appliances or structures owned or controlled by said plaintiff and located in, upon, over or under any public street or other public place of said city."

Subsequent to the adoption of the municipal ordinance heretofore referred to, to-wit, on March 24, 1917, the Board of Public Works of Los Angeles served on the company a notice, in pursuance of said ordinance, to make certain changes in the positions of electrical wires and fixtures on its poles at six street intersections along York Boulevard. [Tr. fols. 24-5.] The poles to which the company's wires and fixtures are attached on and along York Boulevard are owned by it either in fee or jointly with other public service corporations. [Tr. fol. 26.]

One of these jointly owned poles is located at Avenue 50, which is one of the points covered by the aforesaid notice, and according to the bill of complaint [Tr. fol. 26], the company has no position on such pole other than that which it now occupies to which it can remove its wires, as required by such notice, because, as it alleges, all other positions thereon have been assigned to other parties to a "joint pole contract" executed by the company and other utility

companies, of which a copy is attached to the bill of complaint. [Tr. fols. 47-61.]

The difficulty existing, or assumed to exist, at the time the bill of complaint was drafted, with reference to the aforesaid jointly owned pole, was removed by the lowering on such pole of another company's wires which had prevented complainant company from changing the position of its wires as required by such notice. In this way, the requisite positions and clearances were secured for the wires of all companies on such jointly owned poles, including the wires of complainant company. [Tr. fols. 166-9.]

The notice from the Board of Public Works also required the company to shift its wires from its own pole to a position on a pole of the city, at York Boulevard and Avenue 50. [Tr. fols. 25, 26-7.]

The company says that such removals and changes of its wires, as required by the city, would, if made, give it less advantageous positions, and that if obliged to make the same it would be deprived of its right to the use and occupation of positions and locations now lawfully occupied by its wires and other apparatus. [Tr. fol. 27.] These claims are disputed in the answer. [Tr. fol. 84.]

The company further alleges that the municipal ordinance referred to is invalid on the ground that it attempts to delegate to an admin-

istrative board legislative or discretionary powers, which can only be exercised by the council of the municipality. [Tr. fol. 27.] This the answer denies. [Tr. fols. 84-5.]

The company further charges that said ordinance and the notice given thereunder are illegal and void, because (1) they deprive the company of property and rights without due process of law and without compensation, in violation of the fifth amendment of the Federal Constitution; (2) they are contrary to section 14 of article I of the Constitution of California providing "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money or ascertained and paid into court for the owner, irrespective of any benefits from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law"; (3) they constitute an unlawful and confiscatory attempt on the part of appellants to exercise the police powers of the city for the purpose of securing to the city, in its proprietary capacity, rights and property of the company without compen-

sation to the company; and (4) they are contrary to the fourteenth amendment of the Federal Constitution, in that they deprive the company of its property without due process of law, and deny it the equal protection of the law. [Tr. fols. 27-8.] All of which the answer denies. [Tr. fols. 85-6.]

The company further charges that, unless restrained by order of court, the municipal authorities will, under the purported authority of the aforesaid ordinance, bring about the removal of the company's electrical structures and the installation of the city's in place thereof in the public streets, wherever the company occupies favorable locations which are coveted by the city, and, if the company refuses to comply with orders for such removal, the agents of the city will remove the same. [Tr. fols. 29-30.] This the answer denies, appellants saying that it is not the purpose of the Board of Public Works of the city, which has charge of the enforcement of said ordinance, to require the company to remove any of its wires or structures under the provisions of said ordinance, excepting in cases where it appears to that board that the conditions described in said ordinance exist, namely: "whenever it shall appear to said Board of Public Works that the removal or relocation of any pole, anchor, crossarm, wire, street lamp, or any other fixture,

appliance or structure, owned or controlled by complainant, and located in, upon, over or under any public street or public place of said city of Los Angeles, is necessary in order that the municipal electrical street lighting system of said city, or a part thereof, may be erected, operated or maintained in such public street or public place." [Tr. fols. 86-8.]

The company alleges that, unless it complies with the aforesaid ordinance and notice, appellants, if not enjoined, will cause criminal proceedings to be brought against the company and will thereby inflict an irreparable damage upon it, and subject it to a multiplicity of suits; that it has no plain, speedy or adequate remedy at law. [Tr. fol. 30.] The answer denies that irreparable or any damage will be caused the company or that it will be subjected to a multiplicity of suits through the enforcement of said ordinance, or that it has not an adequate remedy at law. [Tr. fol. 88.]

The company further alleges that its rights and franchises to construct and maintain its electrical system on York boulevard are of a value exceeding $10,000, and that its franchise to occupy the public streets and places of the city of Los Angeles is of a value exceeding $1,500,000; that the matter in controversy herein, exclusive of interest and costs, exceeds in value and amount $3,000. [Tr. fols. 31-32.]

The answer says that the company's poles, wires and other property on York Boulevard does not exceed in value $800; that its right and franchises on that boulevard do not exceed in value $100; that its general franchise rights in the city of Los Angeles do not exceed $300,000; and that the matter in controversy in this action, exclusive of interest and costs, does not exceed in value or amount $100. [Tr. fols. 89-90.]

2. The Decision.

The District Court, in disposing of this case, apparently gave no particular consideration to the various issues of fact raised by the pleadings, but determined the question of the constitutionality of such ordinance and order solely upon the face of those measures and the admitted fact that the company was first in the public streets and was maintaining its structures therein under a lawfully granted franchise, and the court's assumption of the fact, "in the absence of evidence of a persuasive nature to the contrary," that the installation of the municipal utility was not justified by "public necessity."

The District Court lays down the following propositions as calling for a decision against the validity of said ordinance:

The city could not, through the exercise of the police power, compel the company to yield its positions in the public streets in order to give room for the municipal lines, unless it makes out a case of public necessity by showing that the electric service to be furnished by means of such lines could not be obtained from existing privately owned utilities at reasonable rates, and no such showing was made. [Tr. fols. 183-5.]

The company is secured against deprivation of its positions in the public streets through the exercise of the police power in aid of the incoming municipal utility, by the principle that "first in time is first in right." [Tr. fol. 188.]

The police power being an attribute of government, may not be exercised by the city to secure positions in its streets for its electric lighting system, which is a proprietary enterprise. [Tr. fol. 189.]

The court assumes it to be a fact that the city, in connection with the enforcement of said ordinance, will cause the company no unnecessary inconvenience or expense in the matter of the readjustment of its poles and wires, but, despite such assumption, holds [Tr. fol. 190-1]:

"* * * in so far as the city intrenches upon the superior right acquired because of prior location by complainant, and in so far as it requires complainant to relocate its instrumentalities at its own expense, not as a matter

of genuine 'public necessity' and justified by considerations of public welfare under the police power, but merely in order that the instrumentalities of the city may be located in their place, its action is, in my judgment, arbitrary, unreasonable and in violation of the superior right of location belonging to complainant, and is, in effect, an appropriation of plaintiff's property without compensation, * * * and is also an impairment of the contractual right accorded to complainant in virtue of its compliance with the constitutional provision hereinabove referred to and its acquisition and acceptance of the constitutional franchise enabling it to perform the public service in which it is now engaged."

Upon these propositions the court directs that a decree be entered declaring "the ordinance void and enjoining its enforcement."

3. The Questions Involved and the Manner in Which They Are Raised.

Where it appears that the company has established and is maintaining its electric pole and wire lines in a public street of Los Angeles under a lawful franchise from the State of California, subject, however, to the express condition, contained in such franchise, that its use of the municipal streets shall be under the direction of the officer or board having control of such streets, and it also appears that the board of such city which has control of the use of its streets is attempting, by resolution passed in conformity with a municipal ordi-

nance and served upon the company, to compel the company, at its own cost, to move its wires and other fixtures to new positions in said street, in order that the city may install therein its own electrical lines for lighting the street and supplying current to consumers; *Quere:*

a. Will suit lie in a Federal court, at the instance of the company, to restrain the enforcement of such municipal regulation and to have the same adjudged invalid, on the ground that it contravenes the provision of the Constitution of the United States forbidding the taking of private property for public use without just compensation?

b. Will suit lie in a Federal court, at the instance of the company, to restrain the enforcement of such municipal regulation, and to have the same adjudged invalid, on the ground that it contravenes the provision of the Constitution of the United States forbidding a state to pass a law impairing the obligation of contracts?

c. Will suit lie in a Federal court, at the instance of the company, to restrain the enforcement of such municipal regulation, and to have the same adjudged invalid on the ground that it contravenes the fourteenth amendment of the Constitution of the United States?

d. Will suit lie in a Federal court, at the instance of the company, to restrain the enforcement of such municipal regulation, and to have the same adjudged invalid on the ground that it contravenes section 14, of article I, of the Constitution of California, forbidding the taking or damaging of private property for public use without just compensation previously paid?

e. Will suit lie in a Federal court, at the instance of the company, to restrain the enforcement of such municipal regulations, and to have the same adjudged invalid on the ground that said ordinance No. 36125 is an attempt to delegate legislative powers to an administrative board?

4. Specification of Errors Relied Upon.

(a) Error of the District Court in holding that said ordinance violates the provision of the Constitution of the United States forbidding the taking of private property for public use without just compensation. [Tr. fols. 27-8, 213-4.]

(b) Error of the District Court in holding that said ordinance No. 36,125 violates the provision of the Constitution of the United States forbidding the state to pass a law impairing the obligation of contracts. [Tr. fols. 214-5.]

(c) Error of the District Court in holding that said ordinance violates the Fourteenth Amendment of the Constitution of the United States. [Tr. fol. 214.]

(d) Error of the District Court in holding that said ordinance and notice are illegal and void on the ground that they violate the provision (section 14 of article I) of the Constitution of California forbidding the taking or damaging of private property for public use without just compensation previously paid. [Tr. fols. 28, 216-7].

(e) Error of the District Court in holding that said ordinance is an unauthorized attempt to delegate legislative powers, and is therefore void. [Tr. fols. 27, 216.]

II.

Brief of the Argument.

1. The order of March 24, 1917, was in conformity with conditions attached to the company's franchise at its inception, and which are binding on the company.

Sec. 19 of Art. XI of the Const. of Cal.;
Sec. 52-A of Los Angeles Charter, Stats. of Cal., 1905, p. 980;
Sec. 146 of Los Angeles Charter;
Knight v. United Land Ass'n, 142 U. S. 161, 35 L. Ed. 974;

Curtis on the Law of Electricity, Sec. 223;

City of Mitchell v. Dak. Cent. Tel. Co., (So. Dak.), 127 N. W. 582;

2. The ordinance and order complained of are a valid exercise of the police power of the city.

(a) The company, besides being bound by contractual conditions attached to its franchise at its inception, is subject to reasonable regulation by the city in the exercise of its police power.

Dillon on Mun. Corps., 5th Ed., Sec. 1269;

Elliott on Roads and Streets, 3rd Ed., Sec. 939;

Sec. 11 of Art. XI of the Const. of Cal.;

Sec. 8 of Art. XI of the Const. of Cal.;

Sec. 2 of Los Angeles Charter, Stats. of Cal. 1889, p. 455; also Stats. of Cal. 1913, p. 1629;

Sec. 31 of Los Angeles Charter, Stats. of Cal. 1911, p. 2051;

Sec. 36-E, Los Angeles Charter, Stats. of Cal. 1909, p. 1289;

Sec. 36-F, Los Angeles Charter, Stats. of Cal. 1909, p. 1289;

Merced Falls Gas etc. Co. v. Turner, 2 Cal. App. 720;

Elliott on Roads and Streets, Sec. 1066.

(b) The regulatory measures complained of are presumed to be reasonable, and the burden is on the company to show the contrary.

People v. Stokes, 118 N. E. (Ill.) 87;
City of Portland v. Montgomery, 62 Pac. (Or.) 755;
Dillon on Mun. Corps., 5th Ed., Sec. 649;
Dillon on Mun. Corps., 5th Ed., Sec. 591;
Ex Parte Haskell, 112 Cal. 412.

(c) The company failed to plead or prove facts sufficient to show that the ordinance and order complained of are arbitrary, unreasonable or confiscatory.

Soon Hing v. Crowley, 113 U. S. 703, 710;
Cooley on Const. Lim., 257, 258 (7th Ed.);
Western Union Tel. Co. v. Syracuse Electric L. & P. Co., 178 N. Y. 325;
Louisville Home Tel. Co. v. Cumberland Tel. & Tel. Co., 111 Fed. 663;
Cumberland Tel. & Tel. Co. v. Louisville Home Tel. Co., 72 S. W. (Ky.) 4;
Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. Ed. 596;
Ex Parte Haskell, *supra.*

(d) The District Court erroneously assumed that the question of "public necessity" for the establishment of the municipal electric lighting

system was for the determination of that court, and that unless the city proved that such necessity existed, the police power could not be availed of to force the company from positions it had taken in the public streets.

Sec. 19, Art. XI., Const. of Cal.;

Subdivision 7, Sec. 2, Los Angeles Charter, Stats. of Cal. 1913, p. 1629;

Miller v. City of Fitchburg, 61 N. E. (Mass.) 277;

Revere Water Co. v. Inhabitants of Town of Winthrop, 78 N. E. (Mass.) 497;

Platt v. City and County of San Francisco, 158 Cal. 74.

(e) The District Court was not justified in holding that the company is protected by the principle "first in time is first in right," against the enforcement of regulatory measures requiring it to change the location of its structures in a public street, in order to make room for a later utility.

Merced Falls Gas etc. Co. v. Turner, *supra;*

Louisville Home Tel. Co. v. Cumberland Tel. and Tel Co., *supra;*

Michigan Tel. Co. v. City of Charlotte, 93 Fed. 11.

3. The District Court erred in holding that the ordinance and order complained of are

unreasonable and arbitrary, on the ground that they have the effect of impairing the obligation of the contract between the company and the state, in violation of section 10 of article I of the Constitution of the United States.

Grand Trunk W. R. Co. v. So. Bend, 227 U. S. 544, 57 L. Ed. 633;

Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. Ed. 721;

Slaughter House cases, 16 Wall. 36, 62, 21 L. Ed. 394, 404;

Chicago and A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. Ed. 1204.

4. The District Court erred in holding that the ordinance and order complained of have the effect of depriving the company of its property and rights without due process of law, in violation of the fourteenth amendment of the Constitution of the United States.

Michigan Tel. Co. v. City of Charlotte, *supra;*

Chicago and A. R. Co. v. Tranbarger, *supra;*

Atlantic Coast Line R. Co. v. Goldsboro, *supra.*

5. The District Court erred in holding that the ordinance and order complained of have the effect of denying to the company the equal protection of the laws, in violation of the

fourteenth amendment of the Constitution of the United States.

Chicago, B. & Q. R. Co. v. Illinois, *supra.*

6. The District Court erred in holding that the ordinance and order complained of have the effect of taking the company's property without just compensation, and of depriving the company of its property or rights without due process of law, in violation of the fifth amendment of the United States Constitution.

Hunter v. Pittsburgh, 207 U. S. 161;
Lloyd v. Dollison, 194 U. S. 445.

7. The District Court erred in holding that the ordinance and order complained of are unreasonable and arbitrary, on the ground that they are, in effect, the taking or damaging of private property for public use without just compensation, in violation of section 14 of article I of the Constitution of California.

Merced Falls Gas etc. Co. v. Turner, *supra;*
Chicago and A. R. Co. v. Tranbarger, *supra;*
New Orleans Gas Light Co. v. Drainage Com., 197 U. S. 453, 49 L. Ed. 831;
Atlantic Coast Line R. Co. v. Goldsboro, *supra;*
Chicago, B. & Q. R. Co. v. Illinois, *supra;*
Lewis on Eminent Domain, Sec. 248 (3rd Ed.).

8. The District Court erred in holding that the ordinance complained of constitutes an unlawful attempt to delegate legislative power to the Board of Public Works of the city.

Field v. Clark, 143 U. S. 649.
Buttfield v. Stranahan, 192 U. S. 470;
Union Bridge Co. v. United States, 204 U. S. 364;
Ex Parte Fiske, 72 Cal. 125;
Harbor Commissioners v. Excelsior Redwood Co., 88 Cal. 491.

III.

ARGUMENT.

I.

The Order of March 24, 1917, was in Conformity With Conditions Attached to the Company's Franchise at Its Inception and Which Are Binding on the Company.

As stated in the bill of complaint [Tr. fol. 13], such franchise arose under section 19 of article XI of the Constitution of California as it existed prior to 1911, and reading thus:

> "In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other offi-

cer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gas light or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

This section was amended in 1911 so as to provide as follows:

"Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries; provided, that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the

consent of such other municipality, expressed by ordinance."

The court will note the language of the constitutional provision under which the company derived its right or franchise to conduct its electrical business in Los Angeles. That is, a company or individual proposing to construct works for supplying light in a city having no works of its own for that purpose, "shall, under the direction of the superintendent of streets, or other officer in control thereof * * * have the privilege of using the public streets and thoroughfares thereof * * * so far as may be necessary for introducing into and supplying such city and its inhabitants either with gas light or other illuminating light * * *."

Prior to the year 1905, the office of superintendent of streets existed under the charter of the city of Los Angeles, but in that year such charter was amended so as to provide for a Board of Public Works which, in addition to other specified functions, succeeded to the office, powers and duties of superintendent of streets. (Sec. 52-a of the Los Angeles charter; Stats. of Cal. 1905, p. 980.)

Section 146 of the Los Angeles charter provides, among other things:

"The Board of Public Works shall have charge, superintendence and control, under

such ordinances as may from time to time be adopted by the city council:

"1. Of all public ways, streets, avenues, boulevards, lanes, alleys, places and courts, now open or which may hereafter be opened, in the city of Los Angeles; of the manner of their use and occupation; of all work and improvements done in, on, over or under the same, and of all excavations made in or under the same."

It thus appears that the company has no specially granted franchise on York Boulevard, which is the scene of this controversy, or, for that matter, any other street of Los Angeles, but is operating therein directly under the constitutional provision conferring upon it "the privilege of using the public streets" of that city "under the direction of the superintendent of streets, or other officer in control thereof."

The condition written into the company's franchise, at its inception, that it should use the public streets "under the direction" of the superintendent of streets, became, therefore, a matter of contract, binding upon the company and even subjecting it to legal process, if necessary, to compel performance.

The phrase "under the direction" is employed in acts of Congress relating to the authority of the Secretary of the Interior over the Commissioner of the general land office in connection with the disposal of public lands. In Knight v. United Land Association, 142 U. S.

161, 35 L. Ed. 974, this court says that such phrase, as used in these acts, "was intended as an expression in general terms of the power of the secretary to supervise and control the extensive operations of the land department of which he is the head."

The Board of Public Works, by its order of March 24, 1917, merely sought to require the company to "move over a little bit" at a half dozen points on York Boulevard, in order to make room for the city's electrical street lighting system. Such action, as we submit, was not only a valid exercise of the police power of the municipality, a point which we will discuss presently, but was in strict conformity with the condition expressed in the company's franchise giving that board the power of direction over its use of the public streets. Since the company accepted its franchise with the condition attached that its use of the streets should be subject to the direction of the municipal official having control thereof, it is bound by the principle which is thus expressed:

> "Subsequent regulations to be valid must be reasonable; but conditions attached to a franchise, when the ordinance is accepted by the company, become matters of contract, and the company may be compelled to perform though their reasonableness may be a matter of dispute."
>
> Curtis on the Law of Electricity, sec. 223.

In City of Mitchell v. Dak. Cent. Tel. Co. (So. Dak.), 127 N. W. 582, the municipality proceeding under a provision of the state constitution that "no street passenger railway or telegraph or telephone lines shall be constructed within the limits of any village, town or city without the consent of its local authorities," granted to the company the right to construct its telephone lines in the public streets, with the condition, among others, attached that after a certain period the company should pay to the city annually a certain percentage of its gross revenues. The company constructed its lines and operated its telephone system in pursuance of the right or franchise thus granted, but refused to comply with the condition requiring payment to the municipality of part of its revenues, and, in the suit instituted by the city to recover the amount due, under such condition, asserted as a defense that the insertion of such condition in the franchise was beyond the competent powers of the municipality. The court held that

> "it is quite apparent from this section of the constitution that there is reserved to the municipality the right to grant or refuse to grant to telephone companies the privilege or franchise for establishing a telephone system within the municipality, and that it necessarily follows that, if it had the right to refuse to grant such franchise or privilege, it necessarily has the

right to grant the same upon such terms and conditions as it may choose to impose, and, if the telephone company accepts the conditions, they become binding upon the company. Such company cannot accept the grant and proceed to install their plant and refuse to comply with the conditions upon which the grant was made."

The court, speaking further of conditions attached to franchises at the time of their grant and acceptance, says:

"Conditions prescribed in ordinances granting the privilege or franchise to telephone companies, subject to the condition of the payment of a portion of its proceeds as compensation for the use of its streets and alleys for telephone purposes, are generally upheld by the courts. And when the terms are accepted and acted upon it becomes a contract binding upon the parties and the party receiving the benefit of the grant is estopped from pleading that the conditions were *ultra vires.*"

II.

The Ordinance and Order Complained of Are Also a Valid Exercise of the Police Power of the City.

(a) The company, besides being bound by contractual conditions attached to its franchise at its inception, is subject to reasonable regulation by the city in the exercise of its police power.

> "* * * when a franchise or privilege is granted to use the city streets for a public service, the grantee accepts the right upon the implied condition that it shall be held subject to the reasonable and necessary exercise of the police powers of the state, operating either through legislative enactment or municipal action."
>
> Dillon on Mun. Corps., 5th Ed., sec. 1269.

> "It cannot be doubted that a company which secures a right to use the streets of a municipal corporation takes it subject to the police power resident in the state as an inalienable attribute of sovereignty."
>
> Elliott on Roads and Streets, 3d Ed., sec. 939.

Section 11 of article XI of the Constitution of California provides:

> "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

The city of Los Angeles is, and for about thirty years past has been, operating under what is popularly known as a freeholders' charter, framed, ratified and approved under the provisions of section 8, article XI of the Constitution of California (Stats. of Cal. 1889, p. 455), and amended from time to time since. (See also Stats. of Cal. 1911, p. 2051.) This charter contains the following provisions:

"Sec. 2. The city of Los Angeles, in addition to any other powers now held by, or that may hereafter be granted to it under the constitution or laws of the state, shall have the right and power:

* * * * * * * *

"(28) To provide for the use, government and control of all property, buildings, institutions and public places of the city.

* * * * * * * *

"(34) To make and enforce within its limits such local police, sanitary and other regulations as are deemed expedient to maintain the public peace, protect property, promote the public morals and to preserve the health of its inhabitants.

* * * * * * * *

"(50) The city of Los Angeles shall have, and it is hereby given, and it hereby reserves unto itself, and the people of the city hereby reserve unto it, and the people of the state of California hereby grant unto it, and said city may hereafter exercise each and every of the powers which a municipal corporation might or could exercise under the Constitution of the state of California: * * *." (Stats. of Cal. 1913, p. 1629.)

The charter of Los Angeles also contains the following provisions concerning the powers of the council, which is the legislative body of the municipality:

"Sec. 31. It shall have power, by ordinance, to regulate the size, quality and location of all water pipes, gas pipes and all other pipes and conduits laid or constructed in the streets, highways and public places of the city, and to require the filing

of charts and maps of such pipes and conduits; also to regulate or prohibit the placing or maintaining of poles and the suspending of wires along or across any of the streets, highways and public places of the city, and to cause the removal and placing under ground of all telephone, telegraph, electric light, or other wires, within the city, or within any designated portion thereof." (Stats. of Cal. 1911, p. 2051.)

"Sec. 36-e. Except as otherwise provided in this charter, or in the Constitution of the state of California, the council shall have power, by ordinance, to regulate and control, for any and every purpose, the use of the streets, lanes, alleys, courts and sidewalks, and other public places of the city."

"Sec. 36-f. The council shall have power, by ordinance, to set apart as a boulevard, or boulevards, any street or streets, or portions thereof, and to make regulations for the use of the same." (Stats. of Cal. 1909, p. 1289.)

Merced Falls Gas etc. Co. v. Turner, 2 Cal. App. 720, holds that the privilege given an electric lighting company by section 19 of article XI of the Constitution of California, does not curtail the power of the municipality to make needful and reasonable regulations touching the use by such company of the streets.

Elliott on Roads and Streets, sec. 1066, in speaking of the regulation of the use of streets by electric companies, says:

"A municipal corporation, invested with local control of the public ways, may regu-

late the use of such ways by electric companies, and may, it seems, within limits, change the mode of use, although it may entail a large expense on the companies. It has been said that a municipal corporation cannot arbitrarily require a change in the location of poles, wires or other appliances, but it is difficult to say what can be considered an arbitrary exercise of power, for there can be no doubt, we think, that under the police power such a corporation may compel changes to be made whenever necessary to promote the public welfare, and that to a very great extent the corporate authorities must be the judges of what is required by the public welfare. At all events, it is clear that a very broad discretion in relation to such matters is conferred upon the municipal officers."

(b) The regulatory measures complained of are presumed to be reasonable, and the burden is on the company to show the contrary.

"It is a familiar rule that * * * in the exercise of the police power of a state it is for the Legislature to determine when the conditions exist calling for the exercise of that power, and that, when the Legislature has acted, the presumption is that the act is a valid exercise of such power."

People v. Stokes, 118 N. E. (Ill.) 87.

"And it will be assumed that the regulations prescribed by the municipal authorities are reasonable and valid until the contrary is made to appear."

City of Portland v. Montgomery, 62 Pac. (Or.) 755.

"It will be presumed that an ordinance is valid, and the burden of establishing invalidity is on the person asserting it."

Dillon on Mun. Corps., 5th Ed., sec. 649.

"It is, of course, within the power of the court to declare an ordinance to be unreasonable and void on its face by a mere inspection of the ordinance, if it is clearly of that character because of the inherent nature of its provisions. But the power of the court to declare an ordinance void because it is unreasonable is one which must be carefully exercised. When the ordinance is within the grant of power conferred upon the municipality, the presumption is that it is reasonable, unless its unreasonable character appears upon its face.

* * * * * * * *

"If the ordinance is not inherently unfair, unreasonable or oppressive, the person attacking it must assume the burden of affirmatively showing that as applied to him it is unreasonable, unfair and oppressive."

Dillon on Mun. Corps., 5th Ed., sec. 591.

Ex parte Haskell, 112 Cal. 412, involved the question of the constitutionality of a municipal ordinance imposing a license fee for the carrying on of a particular business within its limits. It was contended by the defendant that the ordinance was unreasonable, oppressive and unlawfully discriminating. The court says:

"A municipal ordinance must be very clearly obnoxious to such objections as

those made, or some one of them, before it will be declared invalid by the courts. Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the law-making power; and a contrary conclusion will never be reached upon light consideration."

The court also says:

"It is the province and right of the municipality to regulate its local affairs—within the law, of course—and it is the duty of the courts to uphold such regulations, except it manifestly appear that the ordinance or by-law transcends the power of the municipality, and contravenes rights secured to the citizen by the constitution, or laws made in pursuance thereof."

(c) The company failed to plead or prove facts sufficient to show that the ordinance and order complained of are arbitrary, unreasonable or confiscatory.

The company's specific objections to the ordinance, according to its pleading [Tr. fols. 23-5], relate entirely to the motives for its adoption by the Council and its attempted enforcement by the Board of Public Works. It is charged in the bill that such ordinance was adopted, not as a police measure, but solely for the purpose and with the design of depriving the company of advantageous positions in the streets for its poles and wires, for the benefit of the municipal system, and to enable the city to construct and

maintain its system at less cost than otherwise would be incurred.

It is well settled that the courts cannot inquire into the motives of the legislative department in the enactment of laws. This rule has been expressed by the court as follows:

> "And the rule is general, with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation."
>
> Soon Hing v. Crowley, 113 U. S. 703, 710;
>
> Cooley on Const. Lim., 257, 258 (7th Ed.).

Furthermore, even if it be assumed that such ordinance was adopted with the motive or for the purposes charged by the company and that the results apprehended by it would actually flow from the enforcement of such measure, still these circumstances would be entirely consistent with reasonable control by the city of the use of its streets by the company. The power of control reserved to the city is not simply such as will involve no inconvenience, expense or loss of position or advantage to the users of the streets. On the contrary, the con-

tingency that there might be very serious inconvenience and very heavy expense to the company in conforming to the regulations imposed under the police power of the city was an inseparable incident of the grant of franchise which it accepted under the State Constitution and in pursuance of which it established its structures in the public streets.

> "* * * If the city, which has control of the streets both above and below the surface, sees fit to economize space with reference to the wants of the future, it has a right to do so, and for this purpose to place, or authorize another corporation to place, conduit lines so near that of the plaintiff as to make access somewhat inconvenient and expensive. The city cannot destroy the plaintiff's line, nor prevent reasonable access to it, but it is not obliged to consult the mere convenience of the plaintiff, nor study to save it from expense, to the detriment of the public."
>
> Western Union Tel. Co. v. Syracuse Electric L. & P. Co., 178 N. Y. 325.

In the same connection it is declared in Louisville Home Tel. Co. v. Cumberland Tel. & Tel. Co., 111 Fed. 663.

> "Mere inconvenience will not afford ground for complaint. The injury must be grave and unwarranted by the requirements necessary to such further exercise of the municipal authority in that direction as may be deemed expedient."

In Cumberland Tel. & Tel. Co. v. Louisville Home Tel. Co., 72 S. W. (Ky.) 4, both the contending parties were occupying the streets under franchises granted at different times by the municipality, neither of which was exclusive. The company having the older franchise was granted an injunction restraining the later company from interfering with the erection of the former's lines in the streets. From this an appeal was taken by the older company. In the course of its opinion the state court says:

> "The city authorities may rightfully determine in what manner the streets may be used, and to what extent; and when structures may be erected in them; and, within reasonable limits, to fix the space to be occupied by rival telephone lines. Of course, there must be no substantial impairment of appellant's property rights, but mere inconvenience must be endured by it, just as by all others, in the enjoyment of the public utilities of the city."

Likewise, a regulatory measure adopted under the police power is not shown to be unreasonable by the mere fact that compliance therewith will involve expense or damage to the parties or utilities affected. This court, in Chicago B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. Ed. 596, says:

> "We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations de-

signed to promote the public health, the public morals, or the public safety." (Citing cases.)

* * * * * * * *

"This power, as said in Carthage v. Frederick, 122 N. Y. 268, 10 L. R. A. 178, 19 Am. St. Rep. 490, 25 N. E. 480, has always been exercised by municipal corporations, 'by making regulations to preserve order, to promote freedom of communication, and to facilitate the transaction of business in crowded communities. Compensation has never been a condition of its exercise, even when attended with inconvenience or pecuniary loss, as each member of a community is presumed to be benefited by that which promotes the general welfare."

Again, paragraph XXI [Tr. fols. 25-27] sets out what the company regards as the practical physical difficulties of complying with said order. From this paragraph we learn that the poles occupied by the company on York Boulevard are owned by it either "in fee" or jointly with various other public service corporations and that the use of such jointly owned poles is governed by so-called "joint pole agreements," to which the company and such other utility corporations are parties.

The fact that the company is a party to such joint pole agreements and is using poles for carrying its wires jointly with other companies is set up, evidently, to show the practical difficulty of complying with said order. However,

as indicated by the bill [Tr. fol. 26], only one of the poles used by the company on York Boulevard and covered by said order is involved in a "joint pole agreement," to-wit, pole No. 18597-G, located at York Boulevard and Avenue 50, and the difficulty pointed out in the bill of complying with said order in regard to lowering the company's wires on that pole lies in the fact, as alleged in the bill, that all space thereon, other than that at present occupied by the company, has been assigned to other parties to such agreement. However, this particular difficulty disappeared at the trial of the case. Evidence was offered by the company to show that if its wires on pole No. 18597-G were lowered as required by said order they would come into unlawful proximity, under state statutes and regulations, to the wires of another power company. [Tr. fol. 153.] It thereupon developed that such wires of the other power company had themselves been lowered with the consent of that company [Tr. fol. 168] since such order was made and thus the objection of undue proximity had been removed, or, as the trial court put it, "that ground of complaint is obviated." [Tr. fol. 154.]

The only other construction difficulty urged by the company in the way of relocating its wires in compliance with said order is the attaching of its wires at York Boulevard and

Avenue 50 to an arm on the city's pole No. 4263-M at an elevation of forty-one feet four inches. The bill does not show why this arrangement would not be entirely compatible with the interests of the company, but we presume that the difficulty or objection lies in the fact that while the company is willing to use poles jointly with other private utility corporations, it is opposed, on principle, to entering into any such relation with the municipality.

Certainly the fact that the city is willing that the company should use a municipal pole in maintaining the latter's wires at the level required by said order, shows that the making and enforcement of said order was not actuated by a purpose or desire on the part of the public authorities to harass or unduly inconvenience the company in connection with the maintenance of its lines on York Boulevard.

We also urge that there is an entire lack of proof that the ordinance or the order complained of is, in practical operation, arbitrary, unreasonable or confiscatory. The ordinance was adopted and the order was made in March, 1917. According to the bill [Tr. fol. 15], the city had been, for more than two years prior thereto, engaged in the construction and operation of its municipal electric system for supplying energy for the lighting of its public streets and places and for the use of its inhabitants.

Prior to the construction of such municipal system, the city had depended entirely on utility companies for furnishing, under contract, the electric service required for street lighting and from such companies was obtained electric energy for all commercial and domestic uses in the city. York Boulevard was one of the streets of the city which was being electrically lighted by the complainant in this case, prior to the advent of the municipal system.

As stated by a witness for the company [Tr. fol. 150], at the time the city's wires were strung on York Boulevard, the company's wires thereon "had never been used for any other purpose except street lighting, and could not have been used for any other purpose unless the street lighting was cut out. The street lighting was not cut out when the city ran its wires along York Boulevard. It was cut out after the city's lines were erected."

The city, upon assuming the duty of furnishing street lighting, found itself in the predicament depicted in section 6 of the ordinance [Tr. fol. 96]; that is, some of its street lighting contracts had expired and the rest would expire by July 1, 1917, and, as might reasonably have been anticipated, the streets of the municipality were already occupied by the pole and wire systems of various utility companies including the complainant, thus making it diffi-

cult in some places to squeeze in the electrical structures of the city. It was, therefore, necessary, as declared, to provide for "the removal and relocation of certain poles, anchors, cross arms, wires, etc.," of various persons and corporations occupying the public streets, "in order that the city may complete and install its said electrical system."

It was not intended, by such ordinance, to oust the company or any other utility from the streets into which the city desired entrance for its lines, but the object and purpose of the regulation was merely to secure such shifting, relocation or adjustment of existing utility structures here and there as would enable the city to enjoy the privilege of the streets together with the companies already occupying them. The city was undertaking a public service which required that it should make use of the streets, and it was entirely reasonable and proper that earlier occupants thereof, having gained their positions therein subject to the regulatory powers of the state and municipality, should submit to reasonable changes in the locations of their poles and wires in order that the city might install its system.

Not only is the ordinance fair, just and reasonable on its face, but the terms of the order of the Board of Public Works, considered in connection with the attendant circumstances,

clearly show that the motive and purpose of the municipal officials was merely to secure a place in the street with the least possible inconvenience and detriment to the company. In proof of this it is sufficient to point out:

That said order does not require the removal of a single pole of the company;

That while such order requires the removal of certain "old pole top fixtures," the company urged no objection to this at the trial, the reason, no doubt, being, as suggested by a witness for the city [Tr. fol. 173], that the "cutting out" of the company's street lighting service, which required unusually high positions for the lamps, rendered such fixtures useless and unnecessary;

That such order provided for the use by the company of the city's pole at York Boulevard and Avenue 50 for carrying the company's wires in their new position, at that point; and that the city authorities had brought about a shifting of the wires of another power company along York Boulevard in such manner as to permit of the relocation of the company's wires in compliance with said order so as to avoid undue proximity under state regulations [Tr. fols. 167-9];

That by reason of the expiration of the city's street lighting contract with the company along York Boulevard, it was necessary to install the

municipal lines in order to take over this service; that such street lighting had necessitated extra high construction by the company at street corners where its lamps were maintained, and the only changes ordered by the city affecting the company's lines were at street corners where the company had placed fifty-foot poles as against thirty-five-foot poles at points between.

According to the testimony of the company's principal witness, the removal of its wires to the positions assigned to them in said order, with the shifting of the wires of the other power company whose lines were located nearby, left the lines of the company in good mechanical position for use and operation. [Tr. fol. 141.] However, the expiration of the street lighting contract with the company left it without business on its York Boulevard lines, as those lines had been constructed for use and had been used exclusively for street lighting purposes [Tr. fol. 155], and it was necessary to reconstruct those lines in order to adapt them to commercial business. [Tr. fol. 147.]

In view of the fact that the company's lines on York Boulevard, as constructed and used, were for street lighting purposes exclusively, and that the contract with the company for street lighting had expired, and that the city proposed by means of its lines on that boule-

vard to furnish the necessary street lighting, it was perfectly reasonable that the company should, in obedience to the aforesaid order, shift its lines and fixtures on that street to the extent required for the purpose of constructing the municipal lines.

A conflict exists in the evidence as to whether the lines of the company on York Boulevard, now that they are no longer required for the purpose for which they were constructed, namely, street lighting, could under the changed conditions, which would result from compliance with said order, be diverted to general commercial uses. However, in view of the fact that the District Court, in disposing of this case, evidently disregarded all issues of fact made by the pleadings, as well as conflicts and divergence of views in the testimony of the witnesses as to the matter of wire clearances, adaptability of the company's wires to other uses than street lighting and the like, it is quite immaterial, as the case stands, whether compliance with said order would leave the company's system in usable condition for commercial purposes or not. We have already pointed out that the District Court, in deciding this case, made everything turn on the two questions: first, whether the company was first in the street under a lawfully granted franchise, and, second, whether there was a public

necessity for the construction of the municipal lines, such necessity depending on whether the city could obtain the services required from existing companies at reasonable rates.

Even if the evidence showed without conflict that the company's lines in their new locations could be used for general commercial purposes, still the city could not possibly win under the rules laid down by the District Court, as the company's priority in time of location would give it immunity from regulations requiring changes in the position of its structures in order to make room for any later utility, municipal or otherwise.

Taking into consideration all the circumstances of this case, including the allegations of the bill, and the evidence submitted by the company, and viewing the questions in issue on their merits and apart from the particular grounds on which the District Court found its decision, we strongly submit that the company has failed to make a case conforming to the rule which we have heretofore invoked, as follows:

> "A municipal ordinance must be very clearly obnoxious to such objections as those made, or some one of them, before it will be declared invalid by the courts. Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the lawmaking power; and a contrary conclusion will never be reached upon light consideration."
>
> *Ex parte* Haskell, *supra.*

(d) The District Court erroneously assumed that the question of "public necessity" for the establishment of the municipal electric lighting system was for the determination of that court, and that unless the city proved that such necessity existed, the police power could not be availed of to force the company from positions it had taken in the public streets.

The city of Los Angeles is authorized by the State Constitution and its charter to establish, operate and maintain works and structures for supplying the city and its inhabitants with electric current for the purposes of heat, light and power. We have already quoted the constitutional provision in another connection (Sec. 19 of Art. XI, amendment of 1911) as follows:

> "Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both."

The charter provision referred to is subdivision seven (7) of section 2 of that instrument, authorizing the municipality

> "to acquire by purchase, condemnation, lease, gift, or otherwise, or to construct, extend, maintain and operate within or without the city limits, any and all plants and property necessary or convenient for

> furnishing the city and its inhabitants * * * with * * * light, heat, power, * * * or any other public service." (Amendm't to Los Angeles charter, Stats. of Cal., 1913, p. 1629.)

It rested with the municipal authorities, acting under their constitutional powers, and not with the courts, to determine whether a public necessity existed for the establishment of the municipal electric lighting system at the points in question.

Miller v. City of Fitchburg, 61 N. E. (Mass.) 277, holds that the question whether a public exigency or necessity exists for the establishment of a reservoir as a part of the water supply of a city is for the legislature, and not the courts, to determine.

In Revere Water Co. v. Inhabitants of Town of Winthrop, 78 N. E. (Mass.) 497, involving the question of the constitutionality of an act authorizing a town to purchase a water supply from an existing plant, or to purchase the plant itself, the court holds, upon an attack by the water company, on the act:

> "This act was passed to enable the town to supply its inhabitants with water, and whether the public interests would be served by conferring such authority was for the legislature to determine."

Platt v. City & County of San Francisco, 158 Cal. 74, was a suit brought by a taxpayer to enjoin the defendant city and county, and certain of its officials, from taking steps in connection with the issuance of bonds of the municipality voted for street railway purposes. The court, in the course of its opinion, says:

> "The complaint alleges many facts as the basis of a claim that public interest or necessity does not demand that the city and county should construct any street-railroad, such as the existence in said city and county of street-railroads owned and operated by private corporations, furnishing 'ample and adequate means of transportation' to the people thereof. It appears very clear that the determination of the question of public interest or necessity by the board of supervisors in a matter of this character is conclusive upon the courts, at least in the absence of fraud."

Since, then, the question of public necessity is purely political or legislative, and since the location and construction of the proposed municipal lines had been determined upon by the proper municipal authorities, acting within their competent powers, it follows that the District Court was not justified in holding that the ordinance and order attacked in this case were unconstitutional on the ground that there was not a public necessity for the construction of the proposed electrical lines of the city.

(e) Likewise the District Court was not justified in holding that the company is protected by the principle, "first in time is first in right," against the enforcement of regulatory measures requiring it to change the location of its structures in a public street in order to make room for a later utility.

Merced Falls Gas etc. Co. v. Turner, *supra,* which is a widely quoted authority, deals with the status and rights of an electric company occupying the public streets of a municipality of California under the same constitutional provision that the company in this case relies upon. The Merced case was an action for an injunction restraining the board of trustees and superintendent of streets of the city of Merced from changing the position of certain electric light poles of the complainant company in a public street of that city. The board of trustees, by resolution, ordered that these poles be changed to other positions than those previously occupied, and the company having failed to comply with such order, the superintendent of streets was, by another resolution of the board, ordered to make the change and he proceeded to do so, whereupon the action was commenced by the company. Judgment in the lower court went in favor of the municipality. The company thereupon appealed. The

appellate court, after discussing the power of the municipality to make needful and reasonable regulations touching the use of its streets, and adverting to the rule that the local authorities will not be allowed to enforce confiscatory or arbitrary measures, says:

> "But the Constitution, in providing for the exercise and enjoyment of the franchise owned by appellant, did not grant an absolute indefeasible right or easement in the particular spots of earth where its poles were planted originally, nor does the grant contain a hint that the superintendent of streets, or other officer in control thereof, exhausted his jurisdiction or power to direct or control the use of the streets by appellant, when the poles were located in the first instance."

The court further states:

> "The contention of appellant frankly stated and ably advocated is, that the city authorities are absolutely without power to change the poles from the positions they have occupied for so many years. We cannot concur in this view. The original location of the poles by permission of the city authorities created no absolute, indefeasible right, or irrevocable license, to have each pole remain at the particular spot for all time; and it is well settled that lapse of time creates no prescriptive right to public property."

Louisville Home Tel. Co. v. Cumberland Tel. & Tel. Co., *supra*, discusses the rights of a telephone company by reason of prior occu-

pancy of space in public streets under a franchise granted by a statute and ordinance. The court concedes that the company is entitled to the continued enjoyment of its positions in the street so long as it performs its obligations, but declares:

> "But its right is not absolutely exclusive. It is subject to such incidents as result from the exercise of the rights of other parties who have acquired a valid franchise of similar character. It is implied in such grants as were here made to the first company that the grant is subject to such limitations as will enable another company to enjoy a like franchise, and no property right is invaded by the adoption of such measures by the second company as will enable it to exercise its privilege, provided there is no unreasonable and unnecessary invasion of the operations of the first occupant. For the property right of the first is not to a monopoly. It is bound to exercise its privilege in such a way as to give room to another coming in under the power reserved."

It is true that in the last named case the common council of the city expressly reserved the authority to grant to others, if it should deem it for the public interest, the same privileges in its streets as it granted to the complainant, but that fact does not make a different situation from that existing here. The right or franchise of the company in this case is not exclusive and the state reserves the

power to confer upon the municipality the same privileges in its streets as it granted to the company.

The court, in the telephone case, also says:

> "The city at all times has the power of regulation. It may not be arbitrarily exercised, but within reasonable bounds the city authority may rightfully designate in what manner the public interests require public services to be rendered, to the extent, at least, of determining in what part of a street the facilities shall be located, and presumptively this exercise of the police power is valid."

Michigan Tel. Co. v. City of Charlotte, 93 Fed. 11, was a suit in which the telephone company sought to restrain the city from enforcing an ordinance requiring the company to transfer its poles and wires from a public street in which they stood to an alley adjoining said street and running parallel therewith. It was contended by the telephone company, among other things, that such ordinance amounted to an impairment of the obligation of the contract between the company and the city. Upon this point the court says:

> "But here, again, assuming, as we do, that the contract exists, it is well settled that, with respect to contracts of this character, they are subject to such incidental modification as results from legislation required in the public interest. It is a fundamental proposition that the legislature

cannot deprive itself, by contract, of the power to pass such laws as are necessary for the general welfare of the public. Prominent among the kinds of legislation which may be enacted for that purpose are such as are designed for the public safety and convenience."

III.

The District Court Erred in Holding That the Ordinance and Order Complained of Are Unreasonable and Arbitrary on the Ground That They have the Effect of Impairing the Obligation of the Contract Between the Company and the State, in Violation of Section 10 of Article I of the Constitution of the United States.

The company does not specifically invoke the protection of the provision of the Federal Constitution, prohibiting a state to pass any law impairing the obligation of contracts, but the District Court holds that such ordinance constitutes a violation of that prohibition.

The court will not overlook the fact that the company accepted its franchise with the expressed provision attached that its privilege of using the public streets should be under the direction of the official having control of such streets. Besides, as we have already pointed out with respect to contracts such as that which the company claims to have in this case, they

are subject to such incidental modification as results from legislation required in the public interests.

In Grand Trunk W. R. Co. v. South Bend, 227 U. S. 544, 57 L. Ed. 633, the court holds that while a franchise to lay and use a double track in a public street is a contract which could not be impaired, yet, as the police power remained efficient and operative, the municipality has ample authority to make regulations necessitating changes. We quote from the decision:

> "And, as in the viaduct cases, it might require these tracks to be lowered or elevated (Chicago, B. & Q. R. R. v. Nebraska, 170 U. S. 57, 42 L. Ed. 948, 18 Sup. Ct. Rep. 513); or, the franchise, and not the particular location, being the essence of the contract, the city, under the power to regulate, might compel the company to remove the tracks from the center to the side, or from the side to the center, of the street."

And in Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. Ed. 721, we find this language:

> "For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant;

and that all contract and property rights are held subject to its fair exercise."

See also

Slaughter House Cases, 16 Wall. 36, 62; 21 L. Ed. 394, 404;

Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67, 59 L. Ed. 1204.

IV.

The District Court Erred in Holding That the Ordinance and Order Complained of Have the Effect of Depriving the Company of Its Property and Rights Without Due Process of Law, in Violation of the 14th Amendment of the Constitution of the United States.

The theory or claim of the company that the making and enforcement of such ordinance deprive the company of its property without due process of law is based on the untenable ground that it has a vested and indefeasible right to have its wires and other property remain in the particular positions which it has taken in the street. The law governing this situation is clearly defined in Michigan Tel. Co. v. City of Charlotte, *supra*, where it is said:

"This assumes that the complainant has a vested right to occupy this particular street. But this position is untenable. The city was required, when it admitted the

complainant to its streets, to consider the public interests, in defining in what particular streets the lines might be located. The then existing conditions might have made it proper that this street should be so used. But the construction of buildings on the street, and the multiplication of wires, may have rendered it now imprudent that they should remain. The same duty of provident supervision on the part of the city continues to rest upon it. If there was any vested right in the privilege which was accorded by the city to construct and maintain telephone lines in the streets, it is a privilege which must continue in subordination to the strictly legislative action of the city which it exercises in respect to the matters delegated to it by the Legislature for the public welfare."

Chicago & A. R. Co. v. Tranbarger, *supra*, states the law as follows:

"And it is well settled that the enforcement of uncompensated obedience to a legitimate regulation established under the police power is not a taking of property without compensation, or without due process of law, in the sense of the 14th Amendment."

See also:

Atlantic Coast Line R. Co. v. Goldsboro, *supra*.

V.

The District Court Erred in Holding That the Ordinance and Order Complained of Have the Effect of Denying to the Company the Equal Protection of the Laws, in Violation of the 14th Amendment of the Constitution of the United States.

In Chicago, B. & Q. R. Co. v. Illinois, *supra*, a drainage commission, acting under a statute of Illinois, demanded that the railway company remove a certain bridge or culvert under its tracks, and that, if the company continued to maintain a bridge at the same point, one should be substituted to meet the requirements of the plan of drainage adopted by the commissioners. The act under which the order was made provided, that "The commissioners shall have the power, and are required to make all necessary bridges and culverts along or across any public highway or railroad which may be deemed necessary for the use or protection of the work and the cost of the same shall be paid out of the road and bridge tax, or by the railroad company, as the case may be." The railway company declined to construct the bridge ordered and the commissioners commenced a proceeding in the state court to compel such construction. The case came to this court on a writ of error to the Supreme Court of Illinois. It was contended

by the company, among other things, that a judgment in favor of the commissioners would deny to it the equal protection of the laws, in violation of the Constitution of the United States. As to this contention, this court said:

> "Without further discussion, we hold it to be the duty of the railway company, at its own expense, to remove from the creek the present bridge, culvert, timbers and stones placed there by it, and also (unless it abandons or surrenders its right to cross the creek at or in the vicinity of the present crossing) to erect at its own expense and maintain a new bridge for crossing that will conform to the regulations established by the drainage commissioners, under the authority of the state; and such a requirement if enforced will not amount to a taking of private property for public use within the meaning of the Constitution, nor to a denial of the equal protection of the laws."

VI.

The District Court Erred in Holding That the Ordinance and Order Complained of Have the Effect of Taking the Company's Property Without Just Compensation, and of Depriving the Company of Its Property or Rights Without Due Process of Law, in Violation of the Fifth Amendment of the United States Constitution.

The company, in paragraph XXIII of its bill [Tr. fols. 27-8] invokes, as we understand its allegations, the provisions of the 5th Amend-

ment to the Constitution of the United States forbidding the deprivation of property without due process of law and forbidding the taking of private property for public use without just compensation. This provision of the Constitution, however, relates solely to action of the United States and not of a state, and therefore does not apply to this case.

In Hunter v. Pittsburgh, 207 U. S. 161, it was contended that an act of the Pennsylvania Legislature, providing for the consolidation of cities, was in conflict with Article V of the Amendments to the Constitution, on the ground that the proposed consolidation would have the effect of depriving petitioners of their property without due process of law. As to such contention the court said:

> "The fifth amendment to the Constitution of the United States is not restrictive of state, but only of national, action."

In Lloyd v. Dollison, 194 U. S. 445, this court said:

> "It is well established that the first eight articles of the amendments to the Constitution of the United States have reference to powers exercised by the Government of the United States and not to those of the states."

VII.

The District Court Erred in Holding That the Ordinance and Order Complained of Are Unreasonable and Arbitrary on the Ground That They Are in Effect the Taking or Damaging of Private Property for Public Use Without Just Compensation, in Violation of Section 14 of Article I of the Constitution of California.

The conclusion of the District Court in this respect is based on the assumption that the company has a vested right to the places it occupies on York Boulevard. This, however, is an untenable position. In Merced Falls Gas etc. Co. v. Turner, *supra*, it was contended that the authorities were absolutely without power to change its poles from the positions they had occupied in the streets, but the court declares:

> "We cannot concur in this view. The original location of the poles by permission of the city authorities created no absolute, indefeasible right, or irrevocable license, to have each pole remain at the particular spot for all time; and it is well settled that lapse of time creates no prescriptive right to public property."

We have already quoted the rule laid down in Chicago & A. R. Co. v. Tranbarger, *supra*, as follows:

> "And it is well settled that the enforcement of uncompensated obedience to a legit-

> imate regulation established under the police power is not a taking of property without compensation, or without due process of law, in the sense of the 14th Amendment."

In New Orleans Gas Light Co. v. Drainage Com., 197 U. S. 453, 49 L. Ed. 831, the gas company had been given an exclusive right to furnish gas in the city of New Orleans. Later, a drainage commission was created under state statute, with authority to execute a plan for the drainage of that city and to appropriate property, by legal proceedings, for the purpose of constructing a drainage system. It was found necessary, in carrying out the drainage plan adopted, to require a change in the location of the pipes of the gas company. The case came to this court on writ of error to the Supreme Court of the state of Louisiana. In the course of its opinion, this court says, on the subject of uncompensated obedience to a police regulation:

> "It is not contended that the Gas Company has acquired such a property right as will prevent the Drainage Commission, in the exercise of the police power granted to it by the state, from removing the pipes so as to make room for its work, but it is insisted that this can only be done upon terms of compensation for the cost of removal. * * * Uncompensated obedience to a regulation enacted for the public safety under the police power of the state was not taking property without due compensation. In our view, that is all there is to this case. * * *

> The city made no contract that the Gas Company should not be disturbed in the location chosen. In the exercise of the police power of the state, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the Gas Company so as to accommodate them to the new public work. In complying with this requirement at its own expense none of the property of the Gas Company has been taken, and the injury sustained its *damnum absque injuria.*"

In Atlantic Coast Line R. Co. v. Goldsboro, *supra,* this court says:

> "And the enforcement of uncompensated obedience to a regulation established under this power for the public health or safety is not an unconstitutional taking of property without compensation or without due process of law."

Concerning the matter of compliance with regulations under the police power, this court, in Chicago, B. & Q. R. Co. v. Illinois, *supra,* quotes with approval this statement of the rule:

> "Compensation has never been a condition of its exercise, even when attended with inconvenience or pecuniary loss, as each member of a community is presumed to be benefited by that which promotes the general welfare."

Lewis on Eminent Domain, Section 248 (3rd Ed.), thus states the rule:

> "Public service corporations, occupying the public streets, may be compelled to change the location of their tracks, poles, pipes, conduits, or other works, or to reconstruct the same, when necessary for the public health, safety, convenience or welfare, and such requirement is not a taking of property for public use without compensation." (Citing cases.)

VIII.

The District Court Erred in Holding That the Ordinance Complained of Constitutes an Unlawful Attempt to Delegate Legislative Power to the Board of Public Works of the City.

In Field v. Clark, 143 U. S. 649, this court held valid an act of Congress providing that when the President "shall be satisfied" that a duty imposed on certain products by any foreign country is reciprocally unequal or unreasonable, in view of the free introduction of sugar into this country, he shall have power to suspend the provision of the Tariff Act as to free introduction of sugar from such country. In discussing the contention that the act contained an unconstitutional delegation of legislative power to the President, the court said:

> "In Moers v. City of Reading, 21 Penn. St. 188, 202, the language of the court was:

'Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law.' So, in Locke's Appeal, 72 Penn. St. 491, 498: 'To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the Legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know.' The proper distinction, the court said, was this: 'The Legislature cannot delegate its power to make a law: but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation.' "

In Buttfield v. Stranahan, 192 U. S. 470, an act of Congress making it unlawful to bring into the United States tea which was inferior to certain standards which were to be set by the Secretary of the Treasury upon recommendation of a board of seven tea experts, was attacked on the ground that it contained an unconstitu-

tional delegation of legislative power. As to this contention this court said:

> "The claim that the statute commits to the arbitrary discretion of the Secretary of the Treasury the determination of what teas may be imported, and therefore in effect vests that official with legislative power, is without merit. * * * Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute. To deny the power of Congress to delegate such a duty would in effect amount but to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted."

In Union Bridge Co. v. United States, 204 U. S. 364, an act of Congress made it the duty of the Secretary of War, whenever he had good reason to believe any bridge over any navigable way to be an unreasonable obstruction to free navigation, to give notice to the person or corporation owning or controlling such bridge to alter the same so as to render navigation over or under it reasonably free and easy and unobstructed. Such act also provided that, if at the end of a reasonable time, to be prescribed by the Secretary, the changes ordered were not made, criminal proceedings might be taken. Such act was attacked as constituting an unlawful and unconstitutional delegation of power, and upon this point the court said:

> "Beyond question, if it had so elected, Congress in some effective mode, and without previous investigation through executive officers, could have determined for itself primarily the fact whether the bridge herein in question was an unreasonable obstruction to navigation, and if it was found to be of that character could, by direct legislation, have required the defendant to make such alterations of its bridge as were requisite for the protection of navigation and commerce over the water way in question. But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation, and direct legislation covering each case, separately, would be impracticable, in view of the vast and varied interests which require national legislation from time to time."

Ex parte Fiske, 72 Cal. 125, involved an ordinance of the city of San Francisco, prohibiting the alteration or repair of wooden buildings within designated limits without permission in writing signed by a majority of the fire wardens, and approved by the mayor and a majority of the committee on fire department. The ordinance was attacked on the ground, among others, that it contained an unwarrantable delegation of power. In the course of the decision it is said:

> "And it is equally clear that no general rule could be established before hand that would meet the emergencies of individual cases. Therefore, the power to give relief

> in particular instances is conferred on certain officers and it is not to be presumed that they will exercise it wantonly or for purposes of profit or oppression."

In Harbor Commissioners v. Excelsior Redwood Co., 88 Cal. 491, it was held that an act of the State Legislature giving the Board of Harbor Commissioners of Eureka authority to make certain rules and regulations did not contain an unconstitutional delegation of legislative power, although another act, purporting to give the board power to impose penalties for the violation of such rules, was held unconstitutional for the reason that the imposing of penalties is a matter of which the Legislature alone has cognizance. In holding the act giving the board authority to make the rules constitutional, the court said:

> "It would seem that the establishment of rules as to the navigation of Humboldt Bay would be simply acts of executive administration which the Legislature could delegate to the plaintiff as an executive body."

In conclusion, we respectfully submit, that the judgment of the District Court should be reversed.

ALBERT LEE STEPHENS,
City Attorney.
W. B. MATHEWS,
Attorneys for Appellants.

No. 338.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1919.

The City of Los Angeles et al.,
Appellants,
vs.
Los Angeles Gas & Electric Corporation,
Appellee.

FINAL BRIEF FOR APPELLANTS.

Albert Lee Stephens,
Charles S. Burwell,
City Attorney,
W. B. Mathews,

Parker & Stone Co., Law Printers, 332 New High St., Los Angeles

INDEX.

PAGE

I.

Statement of Case..... 3

II.

Argument:

1. The Proposed Enforcement of the Ordinance in Question May Not Be Considered Either a Revocation or an Impairment of Any Right or Obligation Under Appellee's Franchise 7
2. The Attempted Distinction Between Proprietary and Governmental Interests as Objects of the Police Power Is Unfounded..... 12
3. No Justification or Defense of the Doctrine That City May Not Exercise Control Over Streets Without Proving That Electric Service Cannot Be Obtained From Appellee..... 20

AUTHORITIES.

Constitution of California, Sec. 19, Art. XI. 7

Dillon on Municipal Corporations (5th Ed.), Sec. 1298 13

Hamilton Traction Co. v. Hamilton Transit Co., 69 Ohio St. 402, 69 N. E. 991..... 10

Hequembourg v. City of Dunkirk, 49 Hun. 550 13

Madera Water Works v. Madera, 228 U. S. 454 16

Mauldin v. City Council, 33 So. Carolina 1, 7-8 13

McQuillan on Municipal Corporations, Sec. 2645 12

Merced Falls Gas etc. Co. v. Turner, 2 Cal. App. 720 8

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM 1919.

The City of Los Angeles et al., *Appellants,*	
vs.	
Los Angeles Gas & Electric Corporation, *Appellee.*	

FINAL BRIEF FOR APPELLANTS.

If the Court Please:

We beg briefly to reply to the argument of counsel for the appellee, a copy of which was served upon us on September 22, 1919.

In order that our discussion may be kept within definite bounds and be clearly understood, we desire, at the outset of this brief, to again state the grounds and effect of the decision appealed from, and then to set forth our argument.

As declared in the decision of the District Court, there is but one question here involved. That court says:

"On the 7th day of March of this year, the defendant City, through its duly constituted legislative body, enacted an ordinance, the validity of which constitutes the only real question in this case." [Tr, fol, 178.]

The grounds of the decision of the District Court, that such ordinance is unconstitutional and void, are, so far as specifically stated by the court, the following:

I.

That the city failed to prove that such ordinance was justified by "public necessity," by showing that "privately owned utility companies were occupying the streets of the city of Los Angeles to the exclusion of any new entrant therein, and that they were either refusing or were unable adequately to provide for the lighting of the city," and, therefore, "that the city itself is compelled, on the grounds of 'public necessity,' to go into the business of furnishing light to itself and its inhabitants." [Tr. fols. 183-4.]

II.

That the city's electrical utility is a "private and proprietary" enterprise and the city, for the purpose of securing a place therefor in its streets, "may not draw sustenance or power

to itself through an assumption of public and governmental functions." [Tr. fols. 185-7.]

III.

That the company, having secured its position in the public streets under a franchise granted prior to the advent of the municipal utility, is protected by the principle, "first in time is first in right, and superiority of right consequent upon being first in time may not be nullified by even necessary requirements of a competitor or other utility later in time and therefore inferior in right." [Tr. fol. 188.]

IV.

That the action of the city in ordering the company to relocate its lines and structures on York boulevard is "arbitrary, unreasonable and in violation of the superior right of location belonging to complainant, and is, in effect, an appropriation of complainant's property without compensation." [Tr. fol. 190.]

V.

That such action on the part of the city constitutes "an impairment of the contractual right accorded to complainant" under its franchise. [Tr. fols. 190-1.]

VI.

That the city, in order to gain a position for its structures, involving a change of location of

the company's lines, must proceed by purchase or condemnation. [Tr. fols. 191-2.]

Turning now to the argument of counsel for appellee, we find the following points specified as supporting their contention that the decision of the District Court was correct:

(a) That appellee's franchise is an irrevocable contract.

(b) That such ordinance and the order for its enforcement against appellee will impair the obligation of appellee's franchise.

(c) That such ordinance and order violate the "due process" clause of the Federal Constitution.

(d) That the reservation of control in favor of the city over the use of its streets by appellee under its constitutional franchise, includes only the police power.

(e) That the city's electric lighting system is a proprietary enterprise, and that the police power may only be invoked or exercised in aid of or in relation to governmental matters.

Other questions, which appear to be state or local rather than federal, are discussed in the brief of counsel for appellee, but we think we have sufficiently covered these in our opening argument, and so will not further consider them here.

With the general proposition urged by counsel, that appellee's franchise to use the streets

f Los Angeles is an irrevocable contract, and hat the state may not pass any law impairing he obligation of such contract, we, of course, ave no fault to find, but we contend:

I.

hat the Proposed Enforcement of Said Ordinance Against Appellee's Utility, So as to Secure a Place in the Street for the Municipal Utility, Being Consistent With the Reservation in Favor of the City, Under Appellee's Franchise, of the Right to Direct Appellee's Use of the Street May Not Properly Be Considered Either a Revocation or an Impairment of Any Right or Obligation Under Such Franchise.

In this connection, we wish again to quote e provision of the California Constitution ection 19 of article XI) under which appel-'s franchise was derived as a direct and im-ediate grant:

> "In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may

> prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gas light or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

In the light of this section, appellee's franchise is just as if it read as follows:

> Los Angeles Gas & Electric Corporation *shall, under the direction of the superintendent of streets, or other officer in control thereof, have the privilege of using the public streets of Los Angeles,* so far as may be necessary for supplying such city and its inhabitants with electric light.

Appellee, at the time of the adoption of the ordinance of March 7, 1917, was exercising "the privilege of using" York boulevard for the purpose of maintaining and operating its lines for supplying street lighting, and, considering the specific terms of its franchise, such use was subject to the direction and control of the officials in charge of the public streets.

In our opening brief, we quoted from Merced Falls Gas etc. Co. v. Turner, 2 Cal. App. 720, in order that this court might know the views of an appellate court of California of great

ability regarding the effect of the constitutional provision under which appellee obtained its franchise to occupy the public streets of Los Angeles. That case also related to the rights of an electric lighting company in the streets of the city of Merced. We ask the indulgence of the court in again quoting from that authority:

> "But the Constitution, in providing for the exercise and enjoyment of the franchise owned by appellant, did not grant an absolute, indefeasible right or easement in the particular spots of earth where its poles were planted originally, nor does the grant contain a hint that the superintendent of streets or other officer in control thereof exhausted his jurisdiction or power to direct or control the use of the streets by appellant, when the poles were located in the first instance."

The court further states:

> "The contention of appellant frankly stated and ably advocated is, that the city authorities are absolutely without power to change the poles from the positions they have occupied for so many years. We cannot concur in this view. The original location of the poles by permission of the city authorities created no absolute, indefeasible right, or irrevocable license, to have each pole remain at the particular spot for all time; and it is well settled that lapse of time creates no prescriptive right to public property."

So we say, even though appellee has an irrevocable contract with the state authorizing it to establish and maintain its structures in the public streets of Los Angeles, yet the Constitution, in providing for the exercise and enjoyment of the franchise owned by appellee, did not grant "an absolute and indefeasible right or easement in the particular spots of earth where its poles were planted originally," nor did the superintendent of streets or other officer in control thereof exhaust his jurisdiction or power to direct or control the use of the streets by appellee, when the poles were located in the first instance.

The Merced case is in harmony with all pertinent authorities invoked in the brief of counsel for appellee. We need only to refer to one of these authorities, namely, Hamilton Traction Co. v. Hamilton Transit Co., 69 Ohio St. 402, 69 N. E. 991, which, as stated by counsel, involves the matter of the franchise right acquired by a street railway company to use the public streets. Counsel quotes as follows from that case:

> "The right which the grantee acquires by such grant is more than a mere license. It is a vested property right, in the nature of a franchise or easement in and to the particular portion of the street designated in the grant itself; and such grant carries with it the right of exclusive occupancy and user of that portion of the street for

> the purposes for which it is granted, in so far as such exclusive occupancy and user are consistent with the welfare and convenience of the general public."

We suspect that counsel failed to note the effect and significance of the latter portion of the quotation from the above authority, which says:

> * * * "in so far as such exclusive occupancy and user are consistent with the welfare and convenience of the general public."

If, then, as held in the Ohio case, the franchise of the appellant was subject to the right of the state, under its police powers, to require a change of the location of appellant's structures, in so far as its occupancy and user were inconsistent with the welfare and convenience of the general public, then, without question, particularly considering the express reservation, in the franchise of the Los Angeles Gas & Electric Corporation, of the right of direction by the municipality, of appellee's use of the public streets, the structures of the company are subject to change of location in so far as might be necessary to install a municipal lighting utility required for the welfare and convenience of the general public.

II.

The Distinction Attempted to Be Made by the Lower Court and by Counsel for Appellee, Between Proprietary Instrumentalities and Governmental Interests as Objects of the Police Power Is Entirely Unfounded.

Before proceeding with the discussion of this point, we wish to point out that, even if such distinction existed in law, there is no place for it in this controversy. The ordinance which the District Court has condemned was, as shown by its terms, enacted in behalf of the municipal street lighting system of Los Angeles, and even though that utility is owned by the city, it is of a public nature and devoted to a public use and purpose, and its construction and operation are designed to enable the city to perform a public function and duty, that is, the lighting of its streets.

McQuillan on Municipal Corporations, section 2645, says:

> "Lighting the streets of a municipality is universally recognized as a public and governmental function, and this is so although the same plant which supplies the electricity for the street light also supplies the electricity for the lights in private dwellings and business houses."

Dillon on Municipal Corporations, 5th Ed., section 1298, says:

> "The necessity of lighting public streets for the public benefit, for the common convenience of the inhabitants, and as a means of promoting order, and of affording protection to persons and property, is apparent * * *."

In Mauldin v. City Council, 33 South Carolina 1, 7-8:

> "It will scarcely be denied that the peace, security, and good government of the people of a city requires that the streets and public buildings should be lighted at night. It is an essential police regulation, and unless forbidden by the charter, it is the duty of the city government to have this done; and to do it efficiently it is well that the city should own the plant and machinery, if permitted by the charter to do so."

In Hequembourg v. City of Dunkirk, 49 Hun. 550, the question was involved whether the construction or operation of an electric lighting system by the city for its own and its inhabitants' benefit is "for a city purpose" under the State Constitution. The court says:

> "We think it may safely be assumed that the lighting of the streets and public places is one of the duties devolving upon the municipal government, and is a city purpose within the provisions of the Constitution. The care, management, and control of the public streets devolve upon the city government, and it is the duty of the city to maintain them in such condition that the public,

> by the exercise of due care, may pass safely thereon. In the darkness of the night, in crowded thoroughfares, light is an important aid, largely tending to promote the convenience, as well as the safety, of the traveling public, and the duty to supply it, under such circumstances, devolves upon the city."

The court further says:

> "The lighting of the streets by gas involves the necessity of laying mains through the streets, with which the lamps may be supplied with gas; and, in lighting by electricity, the stringing of wires or the laying of conduits, through which the electricity may be conveyed. Light in dwellings is as important and essential as upon the streets, and promotes the general comfort, safety and welfare of the inhabitants; and when it is supplied in connection with that which is furnished by the municipality, under its duty to the public, we think it may be regarded as an incident thereto, and one of the purposes for which the municipality may properly contract."

Not only is the lighting of the streets of a municipality a public and governmental function, but the sovereign taxing power of the state may be exercised for the purpose of providing such service, whether by contract or by the construction of a municipal system. The city of Los Angeles has employed its taxing powers for the purpose of providing, by contract with appellee, for the lighting of certain of its streets, and there is no possible ground

of doubt of its power to do so. If, then, the taxing power of the state may be invoked for the purpose of having a privately owned lighting system or a publicly owned lighting system installed in the public streets for the purpose of lighting such streets, there can be no reason, in principle, for denying that the police power of the state may be invoked for the purpose of securing a place in those streets for a publicly owned electric utility designed to furnish such service.

If A's home may be taxed by the municipality wherein it is located for the purpose of constructing a municipal electric lighting system in the public streets, why may not B's electric system located in such streets be required by the municipality under its police or reserved power to make such reasonable changes in the location of its structures as to give room for the municipal utility?

Not only is the exercise of the city's right to direct the use by appellee of the public streets, to the end that the municipal electric plant may be installed therein, agreeable to the "impairment" and "due process" clauses of the Constitution, but, as has been held by this court, the Fourteenth Amendment may not be invoked to protect a privately owned water system, built and operated under the same section of the California Constitution on which the franchise

of appellee in this case is based, against the construction of a competitive water plant by the municipality, even though the municipal authorities would be empowered under state law to fix the water rates to be charged its citizens by the private company, and to levy and collect taxes on the private utility to help the municipal utility to succeed. We refer to Madera Water Works v. Madera, decided by the same court from which this appeal proceeds, in 185 Fed. 281, and affirmed by this court in 228 U. S. 454. The decision of this court is brief, and tells its own story, and we beg, without further comment, to quote therefrom as follows:

> "This is a bill in equity to restrain the city of Madera from proceeding with the construction of a water plant in competition with one that the plaintiff and its predecessors have built under the Constitution of the state. The Circuit Court sustained a demurrer and dismissed the bill. 185 Fed. Rep. 281. The ground of the suit is that the State Constitution provides that in any city where there are no public works owned by the municipality for supplying the same with water, any individual or corporation of the state shall have the privilege of using the public streets and laying down pipes, etc., for the purpose, subject to the right of the municipal government to regulate the charges. Art. 11, Sec. 19. It is argued that this provision, coupled with the duty imposed on the governing body to fix water rates annually, and the

corresponding duty of the water company to comply with the regulations, both under severe penalties (Art. 14, Secs. 1, 2, Act of March 7, 1881, Secs. 1, 7, 8, Stats. 1881, p. 54, c. 52), imports a contract that the private person or corporation constructing works as invited shall not be subject to competition from the public source. Otherwise, it is pointed out, the same body will be called upon to regulate the plaintiff's charges and to endeavor to make a success of the city works. Furthermore, the plaintiff is forbidden by other provisions to divert its property to other uses, and, again, will be called on to pay taxes to help its rival to succeed. Thus, it is said, the city proposes to destroy the plaintiff's property, contrary to the Fourteenth Amendment of the Constitution of the United States.

"But if, when the plaintiff built, the Constitution of the state authorized cities to build water works as well after works had been built there by private persons as before, the plaintiff took the risk of what might happen. An appeal to the Fourteenth Amendment to protect property from a congenital defect must be in vain."

The Madera case completely refutes the doctrine laid down by the District Court to the effect that "when acting clearly within the domain of its private and proprietary capacity, the city may not draw sustenance or power to itself through an assumption of public and governmental functions." [Tr. fol. 186.]

The District Court says, at the close of its decision:

"I am, however, also firmly of the belief that until the city, by purchase, appeal to eminent domain, or otherwise has lawfully and properly and justly eliminated competition, it must meet its competitors as any other private agency would be compelled to meet them, and must stand with them in the same relation to the law and let its success be measured by its ability satisfactorily to serve the public, rather than by its power through the exertion of public functions to occupy a position of supremacy in the field which it deliberately has chosen to invade." [Tr. fol. 192.]

The suggestion of the District Court that the city may invoke the sovereign power of eminent domain in order to secure the positions it desires in the public streets for its lighting system is hardly consistent with the doctrine laid down by that court that "when acting clearly within the domain of its private and proprietary capacity, the city may not draw sustenance or power to itself through an assumption of public and governmental functions."

It would appear that if the city may invoke the sovereign governmental powers of taxation and eminent domain for the purpose of constructing and establishing an electric lighting system in its public streets, then there can be no ground for doubt that it may "draw sustenance and power to itself," through the exercise of the sovereign, governmental police

power of the state, to compel a reasonable change in location of the structures of a privately owned utility in such streets in order to make room for the municipal system.

We submit, as the true doctrine regarding the proper objects of the exercise of police power in directing and controlling the use of the public streets, that they include, besides drains, sewers and the like, all structures and instrumentalities which lawfully may be implanted or maintained in such streets, including electric light systems, telephone systems, street railways, water systems and other works of a proprietary or governmental character which are necessary or convenient for promoting the public welfare, health and convenience.

In determining what utilities may have the aid of the police power in securing a change of location of existing utilities in order to secure positions in the public streets, the primary question is, whether the incoming utilities are such as the law permits to be established in the streets, and not whether they are governmental instrumentalities, like sewers or drains, or proprietary structures, like railways or lighting systems. All such works, whether governmental or proprietary, are necessary and convenient to meet the requirements of municipal life under modern conditions, and it is not for the private owner of an existing electric utility established

in the public streets to say that he will move over to make room for a governmental sewer, but will not move over to make room for electric lighting lines, proposed to be established in the streets, whether they be owned by the municipality or by private parties.

III.

Counsel for Appellee Offer No Justification or Defense of the Doctrine Laid Down by the District Court That the City May Not Exercise Its Control Over the Streets to the Extent of Requiring a Change of Location of Appellee's Structures in Order to Make Room for the Municipal System Without Proving That the Electric Service Required Cannot Be Obtained From Appellee or Some Other Private Company Operating in the Streets.

Counsel do not insist upon or support this doctrine for the plain reason that it is indefensible. If this rule of "public necessity" existed, then, in case the city were asking a street railway company to shift some part of its structures in order to admit into the street the municipal lighting plant, the company could set up that, notwithstanding the fact that the legislative authority of the city had declared it to be necessary for the public interests that such utility should be built, the city could obtain the

electric service it needed from a private company and, therefore, there was no "public necessity" for the municipal system and the company could not be compelled to vacate the position desired.

Further, according to the doctrine of "public necessity" laid down by the District Court, the court, on such an issue made, would have to try and determine the question of fact whether the construction of the municipal works was justified by "public necessity," and its decision thereon would be controlling.

We submit that such rule of "public necessity" has no existence in law, and the decision of the District Court, which largely depends thereon, proceeds from a false and untenable premise, and should be reversed.

In this case, the District Court, very wisely, as we think, drew the controversy away from any questions of fact and, indeed, practically assumed that all such questions should be deemed decided in favor of the city, and made the whole case turn on what it denominated "the only real question in this case," that is, the validity of the ordinance of March 7, 1917. That court virtually decided that such ordinance was void on its face, and under no circumstances could be upheld under the Constitution of the United States. Counsel for appellee have, as we understand their arguments, taken

the same position. They say that such ordinance is inherently and completely bad, and that the District Court was right in pronouncing it invalid and restraining its enforcement. We submit, in all confidence, that the District Court and counsel are wrong, and are without the slightest authority to support their position.

The principles involved in this controversy are of general concern. They do not affect merely Los Angeles, or the cities of California, but they affect all cities which are now or may hereafter be interested in the matter of establishing municipally owned utilities, whether electric light, water or other works, instead of relying on privately owned utilities, for meeting the necessities of their inhabitants. The case, therefore, is of great importance, and we have no doubt that it will receive the careful consideration by this court to which it is entitled.

Respectfully submitted,
ALBERT LEE STEPHENS,
CHARLES S. BURNELL,
City Attorney,
W. B. MATHEWS.

Due service of the within, and receipt of a copy hereof, is hereby admitted this ..... day of October, A. D. 1919.

_____

_____

Attorneys for Appellee.

FILED
OCT 4 1919
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

THE CITY OF LOS ANGELES, et al.,
Appellants (Defendants below),
vs.
LOS ANGELES GAS AND ELECTRIC CORPORATION,
Appellee (Plaintiff below).
No. 50.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR APPELLEE.

PAUL OVERTON,
HERBERT J. GOUDGE,
Counsel for Appellee.

INDEX.

Page.

atement of Facts 1

ARGUMENT.

Appellee's franchise constitutes an irrevocable contract, the obligation of which will be impaired by the ordinance and order of the City 6

A. Appellee's franchise is an irrevocable contract 6

B. Appellee's franchise vested it with an easement or right of way in the streets occupied by its lines of poles and wires, which easement or right of way is "property" under the protection of the Constitutional guaranties 7

C. The ordinance and order of the City will impair the obligation of Appellee's franchise 8

I. The ordinance and order of the City will (a) "deprive" Appellee of its property without due process of law, contrary to the Constitution of the United States; (b) "take" and (c) "damage" the property of Appellee without just compensation, contrary to the constitution of the State of California 12

A. The ordinance is violative of the "due process" clause of the federal constitution 12

B. The ordinance and order of the City involve a taking of Appellee's property contrary to the constitutional guaranties 13

C. The ordinance and order of the City will damage Appellee's property, without "just compensation having first been made", as required by the constitution of the State of California 17

II. The contention of the City that Appellee's franchise from its inception was subject to impairment and damage by municipal action under the purported ordinance is untenable 19

A. The constitutional provision under which Appellee derived its franchise reserved no right to compel changes and relocations of Appellee's electrical appliances in the interest of the City's proprietary rights 20

B. The City cannot draw upon its governmental powers to enlarge the scope of its proprietary rights 25

1. In constructing and operating an electrical distributing system the City is not performing a governmental function, but is acting in a proprietary capacity 25

2. As between two electric distributing systems priority of position gives superiority of right 30

3. The ordinance and order are not a valid exercise of the police power 31

4. Public necessity will not justify the taking of private property without just compensation 38

IV. The value of Appellee's rights in the streets is determinative of the jurisdiction of this court 41

Conclusion 43

Page.

ppeal of Brum (1888 Pa.), 12 Atl. 855, 856 29

sher v. Independence (1914), 177 Mo. App. 1, 163 S. W. 574, 576 29

thens v. Miller (1914), 190 Ala. 82, 66 So. 702, 705 29

tlantic Coast Line R. Co. v. Goldsboro (1914), 232 U. S. 548, 555, 58 L. ed. 721, 725 13

elleville v. Turnpike Co. (1908), 234 Ill. 428, 84 N. E. 1049 16

ell Tel. Co. v. Belleville Elec. Co. (1886), 12 Ont. Rep. (Q. B. D.) 571 31

hafor v. City of Long Beach (1917), 174 Cal. 478, 163 Pac. 670 27

hicago etc. Ry. Co. v. Chicago (1897), 166 U. S. 226, 233, 41 L. ed. 979, 985 34

hicago v. Selz (1902), 104 Ill. App. 376, 381 29

hicago v. Taylor (1888), 125 U. S. 98, 31 L. ed. 638, 641 18

ity of Seattle v. Stirrat (1909), 55 Wash. 560, 104 Pac. 834 29

avidson v. New Orleans (1877), 96 U. S. 97, 108; 24 L. ed. 616, 620 32

astern Ill. State Normal School v. City of Charleston (1916), 271 Ill. 602, 111 N. E. 573 29

aton v. City of Weiser (1906), 12 Idaho 544, 86 Pac. 541 28

dison Electric Co. v. Citizens Electric Co. (1912), 235 Pa. St. 537 30

dison Electric Light & Power Co. v. Merchants & Manufacturers Co. (1901), 200 Pa. St. 209, 219 30

lenwood Light & Water Co. v. Mutual Light, Heat & Power Co. (1915) 239 U. S. 121, 60 L. ed. 174 42

rand Trunk W. R. Co. v. South Bend (1913), 227 U. S. 544, 555, 57 L. ed. 633, 640 11

lamilton Traction Co. v. Hamilton Transit Co. (1904), 69 O. St. 402, 69 N. E. 991 ..... 8, 15

llinois Trust & Savings Bank v. City of Arkansas City (1896), 76 Fed. 271 29

n re Board of Rapid Transit Comr's. (1909), 197 N. Y. 81, 90 N. E. 456 30

n re Johnson (1902), 137 Cal. 115 ..... 10, 22, 32

Page.

Kansas Natural Gas Co. v. Haskell (1909), 172 Fed. 545, 565 7

Los Angeles Gas & Electric Co. v. City of Los Angeles (1917), 241 Fed. 912 ..... 9, 14, 38, 39

Louisville Home Telephone Co. v. Cumberland Tel. & Tel. Co. (1901), 111 Fed. 663 ..... 36, 37

Matter of Russell (1912), 163 Cal. 668 7

Mayor v. Bailey (1845), 2 Den. 433 29

Merced Falls Gas & Elect. Co. v. Turner (1906), 2 Cal. App. 720 34

New Orleans Waterworks Co. v. Louisiana Sugar Refining Co. (1888), 125 U. S. 18, 31 L. ed. 607, 612 13

Northern P. R. Co. v. Minn. (1908), 208 U. S. 583, 52 L. ed. 630, 633 13

Norwood v. Baker (1898), 172 U. S. 269, 43 L. ed. 443 13

Omaha Water Co. v. City of Omaha (1906 C. C. A. 8th Circuit) 147 Fed. 1 27

Pacific Tel. etc. Co. v. Eshleman (1913), 166 Cal. 640, 137 Pac. 1119 ..... 15, 33, 38

Paris Electric Light Co. v. Southwestern Tel. Co. (1894), 27 S. W. 902 30

People v. Stephens (1882), 62 Cal. 209 22

Perry Co. v. Norfolk (1911), 220 U. S. 472, 55 L. ed. 548 22

Pinney & Boyle Co. v. L. A. Gas Corp. (1914), 168 Cal. 12, 15 40

Price v. Riverside etc. Co. (1880), 56 Cal. 431 40

Proprietors of Mt. Hope Cemetery v. Boston (1893), 158 Mass. 509 32

Pumpelly v. Green Bay etc. Co. (1872), 13 Wall 166, 20 L. ed. 557 17

Reardon v. San Francisco (1885), 66 Cal. 492, 6 Pac. 317 19

Rigney v. Chicago (1882), 102 Ill. 64 19

Ross v. Oregon (1913), 227 U. S. 150, 162, 57 L. ed. 458, 463 13

Russell v. Sebastian (1914), 233 U. S. 194, 58 L. ed. 912 ..... 6, 22, 40

Page.

Rutland Electric Light Co. v. Marble City Electric Co., (1893), 65 Vt. 377, 26 Atl. 635 30
Safety Insl. Wire & Cable Co. v. Baltimore (1895), 66 Fed. 140 29
So. Bell Tel. Co. v. Mobile (1907), 162 Fed. 523 7
South Carolina v. United States (1905), 199 U. S. 436, 463, 50 L. ed. 261, 270 26
South Pasadena v. Pasadena Land Co. (1908), 152 Cal. 579, 93 Pac. 490 ..... 8, 27
St. Paul Gaslight Co. v. St. Paul (1901), 181 U. S. 142, 148, 45 L. ed. 788, 791 13
State v. Missouri Pac. R. Co. (1912), 147 S. W. 118, 121 36
Stearns v. Minn. (1900), 179 U. S. 223, 45 L. ed. 162 22
Stockton Gas Co. v. San Joaquin Co. (1905), 148 Cal. 313 7
Vallejo Ferry Co. v. City of Vallejo (1905), 146 Cal. 392 80 Pac. 514 27
Vilas v. Manila (1911), 220 U. S. 345, 356, 55 L. ed. 491, 495 25
Walla Walla v. Walla Walla Water Co. (1898), 172 U. S. 1, 43 L. ed. 341 12
Western Savings Fund Society v. Phila., 31 Pa. 175, 72 Am. Dec. 730, 735 26
Wichita Water Co. v. City of Wichita (1916), 234 Fed. 415 29

OTHER REFERENCES.

15 Am. & Eng. Ency. of Law (2d. ed.) 1049 11
California Constitution, section 14, Art. I 12, 18
California Constitution, section 19, Art. XI 20, 21
California Statutes of 1911, p. 1037 9
26 Cyc. 377 40
28 Cyc. 125 26
Freund—Police Power 31, 32
Lewis—Eminent Domain 16
McQuillin—Municipal Corporations 28
Order of Board of Public Works, City of Los Angeles 3
Railroad Commisssion of State of California, General Order 26 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

THE CITY OF LOS ANGELES, et al., *Appellants (Defendants below)*, vs. LOS ANGELES GAS AND ELECTRIC CORPORATION, *Appellee (Plaintiff below)*.	No. 50.

BRIEF FOR APPELLEE.

Statement of Facts.

Little need be added to the statement of facts in the brief for Appellants. A chronological re-statement of a few of the outstanding facts is desirable, however, to impart a clearer conception of the history of this controversy, which grows out of the existence in the city of Los Angeles of two electric distributing systems—one owned and operated by Appellee and its predecessors in interest for more than thirty years, and the other, which came into existence in the year 1916, owned and operated by Appellants, hereinafter referred to as the City.

Appellee, a California corporation, possesses and enjoys a franchise or easement in the public streets of the

City of Los Angeles, derived from an acceptance of the grant contained in section 19 of Article XI of the California Constitution as that section existed prior to its amendment on October 10, 1911; and pursuant thereto Appellee for a number of years has been operating and maintaining a system of poles, wires, conduits and other electrical appliances in the streets and other public places of the City of Los Angeles for the purpose of supplying and furnishing electric energy to said city and to the inhabitants thereof for illuminating and other purposes (R. p. 119). Appellee's distributing system was constructed long prior to the 1911 amendment to section 19 of Article XI of the California Constitution and long prior to the commencement of the construction of the City's electric distributing system (R. p. 10).

In constructing its electric distributing system the City frequently interfered with poles and wires in Appellee's distributing system. This interference assumed such serious proportions on York Boulevard, one of the public thoroughfares of the City of Los Angeles, that it became necessary for Appellee on January 25, 1917, to institute proceedings in the State Superior Court to enjoin and restrain such interference (R. p. 18). A temporary injunction was issued by that Court on February 15, 1917 (R. pp. 22-23), and on March 21, 1917, a final judgment was entered in that proceeding enjoining and restraining the City "from in any manner trespassing upon, interfering with, moving or displacing the poles or wires, or either or any of them, owned or controlled wholly or in part by plaintiff; or erecting or placing any pole, cross-arm or other electrical appliance or equipment or attaching any wire or cable to or upon any pole,

cross-arm or other electrical appliances or equipment in a fixed position within the distance from any pole, cross-arm, wire or other electrical appliance or equipment owned or controlled wholly or in part by plaintiff, as prescribed by the laws of the State of California and the rules and regulations of the Railroad Commission of said State" (R. pp. 23-26). No appeal was taken by the City from this decree and in due course it became a final judgment.

Subsequent to the issuance of the temporary injunction and on March 6th, 1917, the Council of the City of Los Angeles passed the ordinance which is the subject of this attack, being ordinance No. 36125 (N. S.) and which was on the following day approved by the Mayor of said city (R. pp. 27-29). Thereafter, and after the entry of the final judgment of the state court, the City's Board of Public Works (one of the Appellants herein) delivered to Appellee its order dated March 24, 1917, in words and figures as follows, towit:

"March 24, 1917.

Los Angeles Gas & Electric Corporation, Los Angeles, Cal.

Gentlemen: At a meeting of the Board of Public Works of Los Angeles, California, held March 24, 1917, you were directod to make the following changes in the elevation of your wires, cross arms, etc., on York Boulevard, towit:

Armadale Avenue and York Boulevard, remove old pole top fixture from top of your pole No. 18595-G and lower your wires taking any position you may desire below 41 feet above curb line.

York Boulevard and Avenue 49, remove old pole top fixture from top of your pole No. 18596-G and

lower your wires, taking any position you may desire below 41 feet above curb line.

York Boulevard and Avenue 50, remove pole top fixture from pole No. 18597-G. Lower wires on York Blvd. on Pole No. 18597-G to 41 ft. 6 in. level. Lower wires on No. 18597-G running south on Avenue 50 to any level between 41 ft. 6 in. and 39 ft. 6 inch. Place your wires on pole No. 4263-M on present city arm at 41 ft. 4 in. level.

York Boulevard and Avenue 51, remove old pole top fixture from your pole No. 18599-G, and lower your wires to any position below 40 feet above the curb line.

York Boulevard and Avenue 52, lower your wires on your pole No. 18600-G to any position below 41 feet above curb line.

York Boulevard and Avenue 53; lower line arm on pole No. 18601-G to the 36 ft. 6 in. level using the 34 ft. 6 in. level for buck arm for wires running north on Avenue 53.

This order is given pursuant to the provisions of Ordinance No. 36,125 New Series, which provides that the work of removal and relocation shall be commenced within a period of 5 days from the receipt of this notice and prosecuted diligently to completion.

Yours very truly,

BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES,

By LORIN A. HANDLEY, President,

By HORACE B. FERRIS, Secretary."

(R. p. 15).

Appellee's Superintendent of Electric Distribution, E. R. Northmore, testified in the court below that a compliance with this order would in one instance deprive Appellee of the use of 10 feet of one of its poles (R. p.

90), and that Appellee would be prevented from constructing any additional lines on the pole on account of insufficient clearance to comply with the order of the California Railroad Commission (R. p. 91). This witness further testified that it would cost Appellee $10. to make the changes on each of two of the poles specified in said order (R. p. 110) and that a compliance with the order as to these poles would deprive Appellee of its top position, which is the most advantageous position on the poles, because in the words of the witness:

> "It gets you out of the trees, for one thing, which is a great saving to the company, and also keeps you away from the other companies stringing wires or working, workmen getting lines across yours. If you are above them you have the best position and your maintenance is less. You don't have the wires burned down or tree trimming to do. * * * It is safer for them (employees of Appellee) because there is less trouble getting into other stuff" (R. p. 93).

Also on page 94 of the record, in connection with the interference with one of the poles last referred to, this witness testified:

> "There is no reason from a construction, or mechanical standpoint, why the City of Los Angeles should not have installed a pole 10 feet higher and if they had done so they would have cleared the wires of plaintiff corporation. The extra 10 feet would cost the City about $4.50."

The bill of complaint raises federal and state questions. The complainant contended that the removal or relocation of its poles and wires and other electrical appliances in the manner authorized by the ordinance

would deprive complainant of its property without due process of law and would so interfere with the exercise and enjoyment of complainant's franchise as to involve (a) the impairment of the obligation of complainant's franchise in violation of the Federal Constitution, (b) a "taking" of complainant's property in violation of the Federal Constition and the Constitution of the State of California, and (c) a "damaging" of complainant's property, contrary to the State Constitution.

Defendants below contended that the right to do the things authorized by the ordinance was justified by "public necessity" and the "police power" (R. p. 123).

Argument.

I.

APPELLEE'S FRANCHISE CONSTITUTES AN IRREVOCABLE CONTRACT, THE OBLIGATION OF WHICH WILL BE IMPAIRED BY THE ORDINANCE AND ORDER OF THE CITY.

A. Appellee's Franchise is an Irrevocable Contract.

The franchise right or privilege of Appellee to use the public streets and thoroughfares of the city is derived from Appellee's acceptance of the offer contained in section 19 of Article XI of the Constitution of the State of California as that section existed prior to its amendment on October 10, 1911. That section of the California Constitution was before this court in the case of Russell v. Sebastian (1914), 233 U. S. 195, 58 L. ed. 912, and the Court there said (233 U. S. 204):

"That the grant resulting from the state's offer,

constituted a contract, and vested in the accepting individual or corporation a property right, protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this court."

That case establishes the law on this proposition. It is unnecessary therefore to cite further authorities on the point.

B. Appellee's Franchise Vested it with an Easement or Right of Way in the Streets Occupied by its Lines of Poles and Wires, Which Easement or Right of Way is "Property" under the Protection of the Constitutional Guaranties.

In Southern Bell Tel. Co. v. Mobile (1907), 162 Fed. 523, 532, the court says:

> "A right of way upon a public street, whether granted by an act of the legislature or ordinance of the city council, is an easement, and as such is a property right and entitled to all the constitutional protection afforded other property and contracts."

See also:

Kansas Natural Gas Co. v. Haskell (1909), 172 Fed. 545, 565;

Stockton Gas Co. v. San Joaquin Co. (1905), 148 Cal. 313, 319.

In Matter of Russell (1912), 163 Cal. 668, 126 Pac. 875, the court in speaking of the franchise or privilege obtained under section 19 of Article XI of the State Constitution, says:

> " . . . this franchise or privilege, when accepted and used, is an incorporeal hereditament, an easement in the particular street and partaking of the realty." (163 Cal. 679.)

To the same effect:

South Pasadena v. Pasadena Land Co. (1908), 152 Cal. 579; 93 Pac. 490.

In Hamilton Traction Co. v. Hamilton Transit Co. (1904), 69 Ohio St. 402, 69 N. E. 991, involving the nature of the franchise right acquired by a street railway company to use the public streets of a municipality, the court says:

> "The right which the grantee acquires by such grant is more than a mere license. It is a vested property right, in the nature of a franchise or easement in and to the particular portion of the street designated in the grant itself; and such grant carries with it the right of exclusive occupancy and user of that portion of the street for the purposes for which it is granted, in so far as such exclusive occupancy and user are consistent with the welfare and convenience of the general public." (69 N. E. 994).

C. The Ordinance and Order of the City Will Impair the The Obligation of Appellee's Franchise.

As shown by witnesses for Appellee, compliance with the order issued by the Board of Bublic Works of the City will impair the free exercise and enjoyment of Appellee's franchise by physically interfering with such exercise and enjoyment. Witness Northmore testified (R. p. 89):

> " . . . that by dropping the wires of the plaintiff corporation down, and placing them in the position designated by the Board of Public Works of said City, it means placing the two wires running north on Avenue 53 less than four feet from the wires of the Pacific Light & Power Corporation,

> running east and west, which is a violation of the rules of the California State Railroad Commission, which provides that where 2400 volt wires cross other 2400 volt wires there shall be not less than four feet clearance. Also the wires would be about three feet from the wires of the Pacific Light and Power Corporation. There would not be sufficient clearance between the two, which is in conflict with the State law (meaning California Statutes of 1911, p. 1037, as amended by Statutes of 1915, p. 1058) and General Order 26 of the Railroad Commission." (This order is set out in the Record at pp. 104-109.)

This witness further testified at p. 93 of the Record that to make the changes provided in said order of the City's Board of Public Works would interfere with the exercise of Appellee's easement or right of way by compelling Appellee to lower its wires, thereby losing the more advantageous higher position on the poles; that the higher position is more advantageous because, in the language of the witness:

> "It gets you out of the trees, for one thing, which is a great saving to the company, and also keeps you away from the other companies stringing wires or working, workmen getting lines across yours. If you are above them, you have the best position and your maintenance is less. You don't have the wires burned down, or tree trimming to do. . . . It is safer for them (the company's employees) because there is less trouble getting into other stuff."

On this point the trial judge said, (Los Angeles Gas & Electric Co. v. City of Los Angeles (1917), 241 Fed. 912, 920 (R. p. 127):

> " * * * in so far as the city intrenches upon the superior right acquired because of prior location by complainant, and in so far as it requires complainant to relocate its instrumentalities at its own expense, not as a matter of genuine 'public necessity' and justified by considerations of public welfare under the police power but merely in order that the instrumentalities of the city may be located in their place, its action is, in my judgment, arbitrary, unreasonable and in violation of the superior right of location belonging to complainant, and is, in effect, an appropriation of plaintiff's property without compensation, * * * and is also *an impairment of the contractual right accorded to complainant in virtue of its compliance with the constitutional provision hereinabove referred to* and its acquisition and acceptance of the constitutional franchise enabling it to perform the public service in which it is now engaged." (Italics supplied.)

In In Re Johnson (1902), 137 Cal. 115, the supreme Court of California, in holding invalid an ordinance of the City of Pasadena requiring the securing of a permit before making excavations in the public streets under the grant contained in section 19 of Article XI of the State Constitution, says (137 Cal. 120):

> "When the sovereign authority of the State, either in its Constitution or through its legislature, has created a right and has expressed and defined the conditions under which it may be enjoyed, it is not within the province of a municipality where such right is sought to be exercised or enjoyed to impose additional burdens or terms as a condition to its exercise. The constitution does not authorize the municipality to require a permit as a condition upon which the pipes may be laid in its streets, and its claim of a right to require a permit includes the right to re-

> fuse one, and the right to annex one condition to the exercise of the privilege implies the right to annex others, *which may at least impair,* if not in fact amount to a denial of its existence." (Italics supplied.)

If an ordinance merely requiring the securing of a permit from a municipality before excavations might be made is an impairment of the obligation under the constitutional grant, how much greater would be such impairment under an ordinance requiring Appellee to remove and relocate its poles, wires and other electrical appliances throughout the city, which would, as found by the trial court "entail an expenditure on plaintiff of over $50,000." (R. p. 122.)

The rule is thus stated in 15 Am. & Eng. Ency. of Law (2d ed.) 1049:

> "The obligation of a contract implied in a grant will be impaired by a legislative attempt to revoke the grant or by the imposition of subsequent *burdens* or conditions on the use or enjoyment of the property, right or franchise granted."

As is said by this court in speaking of a franchise granted to a railway company, in Grand Trunk W. R. Co. v. South Bend (1913), 227 U. S. 544; 57 L. ed. 633, 640:

> "The power to regulate implies the existence, and not the destruction, of the thing to be controlled. And while the city retained the power to regulate the streets and the use of the franchise, it could neither destroy the public use nor impair the private contract, which, as it contemplated permanent and not temporary structures, granted a permanent and not a revocable franchise."

See also:

Walla Walla v. Walla Walla Water Co. (1898), 172 U. S. 1; 43 L. ed. 341.

II.

THE ORDINANCE AND ORDER OF THE CITY WILL (a) "DEPRIVE" APPELLEE OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, CONTRARY TO THE CONSTITUTION OF THE UNITED STATES; (b) "TAKE" AND (c) "DAMAGE" THE PROPERTY OF APPELLEE WITHOUT JUST COMPENSATION, CONTRARY TO THE CONSTITUTION OF THE STATE OF CALIFORNIA.

A. The Ordinance is Violative of the "Due Process" Clause of the Federal Constitution.

In and by section 14 of Article I of the Constitution of the State of California it is provided that:

> "Private property shall not be *taken* or *damaged* for public use without just compensation having first been made to, or paid into court for, the owner,"

The due process clause of the Federal Constitution is violated if private property is "taken" for public use without just compensation. Such is the settled ruling of this court:

> " * * * it must be observed that the prohibitions of the amendment (14th) refer to all the instrumentalities of the state, to its legislative, executive, and judicial, and, therefore, whoever by virtue of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state! This must be so, or, as we have often

> said, the constitutional provision has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.' " Chicago etc. Ry. Co. v. Chicago (1897), 166 U. S. 226, 233; 41 L. ed. 979, 985.

In Norwood v. Baker (1898), 172 U. S. 269, 43 L. ed. 443, this court said:

> "It has been adjudged that the due process of law prescribed by that amendment requires compensation to be made or secured to the owner when private property is taken by a state or under its authority for public use." (127 U. S. 277, 43 L. ed. 447).

This court has uniformly held that an ordinance of a municipality enacted by virtue of power for that purpose delegated by the legislature of the state, is a state law within the meaning of the Federal Constitution.

See:

New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co. (1888), 125 U. S. 18, 31, 31 L. ed. 607, 612;

St. Paul Gaslight Co. v. St. Paul (1901), 181 U. S. 142, 148, 45 L. ed. 788, 791;

Northern P. R. Co. v. Minnesota (1908), 208 U. S. 583, 590, 52 L. ed. 630, 633;

Ross v. Oregon (1913), 227 U. S. 150, 162, 57 L. ed. 458, 463;

Atlantic Coast Line R. Co. v. Goldboro (1914), 232 U. S. 548, 555, 58 L. ed. 721, 725.

B. The Ordinance and Order of the City Involve a Taking of Appellee's Property Contrary to the Constitutional Guaranties.

Appellee here contends that the location or position of its poles and wires in the streets of the city pursuant to the constitutional grant is a property right which may not be "taken" under section 14 of Article I of the California Constitution "without just compensation having first been made to, or paid into court for, the owner". The ordinance makes no provision for compensation. It purports to authorize a taking without compensation, not under the police power, but for the use of the city in its proprietary capacity.

As is said by Judge Bledsoe in his opinion in the court below (R. p. 122), (241 Fed. 912, 915);

> "It is apparent from even a casual reading of the enactment, that, if it be valid, 'in order that the municipal electrical street lighting system may be constructed, operated and maintained,' the city purposes, in so far as and whenever the same may be necessary to allow of the proper installation of the municipal system, to require complainant and other privately owned companies holding franchises and maintaining instrumentalities for the transmission and delivery of electrical energy in the city of Los Angeles to remove to such places as may be ordered by the City all apparatus and instrumentalities that may interfere with the proper installation of the municipal system. In other words, the City of Los Angeles having decided, because of reasons which were no doubt sufficiently cogent and persuasive, that it would engage in the business of furnishing electrical energy to itself and to its inhabitants, in order that it may proceed in accordance with its own determined plans in the premises, has decreed by ordinance that privately owned companies engaged in the same business, and now and for some time lawfully occupying the public streets, may be required to remove or relocate, at their own expense,

and subject to a penalty of fine and imprisonment for refusal, such instrumentalities situate upon the public ways of the city as seem to interfere with the proposed installation of its system. Or, to phrase it still differently, in order that its own municipal lighting system heretofore determined upon may be installed, the city has enacted that, in so far as the same may be necessary, other systems already installed and belonging to private corporations, must be removed or relocated at the expense of the owners thereof."

addition to the ordinance involving the actual "tak-" of Appellee's location or position in the streets as wn by the evidence, Appellee will also be deprived he *use* of its property. The evidence establishes that mpliance with the order of the Board of Public rks would in one instance deprive Appellee of the use nore than ten feet of one of its poles (R. p. 90).

he rule applicable here is well stated in the opinion Hamilton Traction Co. v. Hamilton Transit Co. 04), 69 Ohio St. 402, 69 N. E. 991, 994, where the court s:

"To constitute a taking of property it is not necessary that there shall be an exclusive appropriation, a total assumption of possession, or an absolute and total conversion of the entire property. One of the valuable incidents of absolute property is the right of user. * * * Hence any serious abridgement or interruption of the common and necessary use of property may amount in law to a taking and entitle the owner to compensation."

Pacific Telephone & Telegraph Co. v. Eshleman 13), 166 Cal. 640, 137 Pac. 1119, the court had before n order of the California Railroad Commission com-

pelling the plaintiff to permit a physical connection to be made between its lines and the lines of certain other companies operating telephone exchanges. In holding that "the order in question admittedly gives no compensation for the taking of petitioner's property and is therefore void by force and virtue of the Constitution of the State and of the United States", the court said (166 Cal. 665, 137 Pac. 1127):

> "Another principle, quite as important and quite as fundamental, is that 'taking' of property within the meaning of the constitution is not restricted to a mere change of physical possession, but includes a permanent or temporary deprivation of the owner of its use. The principle is thus stated by Lewis on Eminent Domain as follows: 'If property then consists not in tangible things themselves, but in certain rights in and appurtenant to those things, it follows that when a person is deprived of any of those rights he is to that extent deprived of his property and hence that his property may be taken in the constitutional sense though his title and possession remain undisturbed; and that it may be laid down as a general proposition based upon the nature of the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the power of eminent domain, his property is pro tanto taken and he is entitled to compensation'. (2d. ed. sec. 56, 3d. ed. sec. 65)."

In Belleville v. Turnpike Co. (1908), 234 Ill. 428, 84 N. E. 1049, the court says:

> "Private property forbidden by the Constitution to be taken or damaged for public use without just compensation is not limited to the tangible subject-matter or corpus of the property, *but includes the*

right of user or enjoyment of it, when such rights are destroyed or taken for public use their owner is entitled to compensation" (84 N. E. 1051).

In Pumpelly v. Green Bay etc. Co. (1872), 13 Wall 166, 20 L. ed. 557, this court held that property was taken when the owner was deprived of its beneficial use, saying:

> "It would be a very curious and unsatisfactory result, if in construing a provision of a constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent can; in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors." (20 L. ed. 560.)

C. The Ordinance and Order of the City will "Damage" Appellee's Property Without "Just Compensation Having First Been Made" as Required by the Constitution of the State of California.

The "damage" here complained of would result from

Appellee being compelled to remove its wires from their present higher and more advantageous position to a lower and less advantageous position on the poles. As shown by the evidence the higher or top position on the pole is more advantageous because of the economy of operation by reason of keeping the wires out of shade trees along the street and removes the danger of the wires being burned and destroyed by short circuits caused by contact with wires which are being "strung" or erected by the workmen of other companies. (R. p. 93).

The necessity for protecting private property from injury such as this led to the adoption by the several states of provisions similar to that found in the California Constitution, which reads:

> "Private property shall not be taken or *damaged* for public use without just compensation having first been made to, or paid into court for, the owner, . . . " (Const. Calif. sec. 14 Art. I.)

In Chicago v. Taylor (1888), 125 U. S. 98; 31 L. ed. 638, 641, in speaking of a similar provision of the Illinois constitution of 1870, this court said that "the framers of that instrument evidently had in view the giving of greater security to private rights" and that:

> "The new rule of civil conduct, introduced by the present constitution, . . . require compensation in all cases where it appeared 'there has been some physical disturbance of a *right*, either public or private, which the plaintiff *enjoys in connection with his property*, and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally'."

As will be hereafter shown, the city is not acting within its governmental capacity so as to make applicable the principal of damnum absque injuria. It is not a consequential injury flowing from a valid regulation in the interest of the public safety or welfare of the inhabitants of the city, but is an injury to Appellee's property resulting from an illegal attempt to exercise the police power *in the interest and for the benefit of the city in its proprietary operations.*

See also:

Reardon v. San Francisco (1885), 66 Cal. 492; 6 Pac. 317;

Rigney v. Chicago (1882), 102 Ill. 64.

III.

THE CONTENTION OF THE CITY THAT APPELLEE'S FRANCHISE FROM ITS INCEPTION WAS SUBJECT TO IMPAIRMENT AND DAMAGE BY MUNICIPAL ACTION UNDER THE PURPORTED ORDINANCE IS UNTENABLE.

This claim of the City is based on the proposition that the cost to Appellee of removing and relocating its poles, wires and other electrical appliances, as well as the damage and injury which will be suffered by Appellee by reason of surrendering to the City the more advantageous positions in the streets now occupied by Appellee's electrical appliances, is damnum absque injuria.

The City's argument on this point may be briefly stated as follows: first, that the right to require such changes and relocations was reserved to the city at the time Appellee acquired its franchise, and second, that the

ordinance and order complained of are a valid exercise of the police power of the City.

These propositions will be discussed in the order of their treatment in Appellants' brief.

A. The Constitutional Provision under which Appellee Derived Its Franchise Reserved No Right to Compel Changes and Relocations of Appellee's Electrical Appliances in the Interest of the City's Proprietary Rights.

The City contends (Page 27, brief for Appellants) that the order of the Board of Public Works was in conformity with the conditions attaching to Appellee's franchise in its inception. Such conditions if they exist are to be found in section 19 of Article XI of the State Constitution as that section existed prior to its amendment on October 10, 1911, since Appellee's franchise is derived from an acceptance of the grant contained in that section. It reads as follows:

> "In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose under and by authority of the laws of this State, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government

shall have the right to regulate the charges thereof." (Const. California, Sec. 19, Art. XI.)

The argument of the City as applied to the facts in this case may be reduced to this proposition: That the phrase "under the direction of the superintendent of streets or other officer in control thereof" reserves to the City the right to compel Appellee to remove and relocate its poles and wires in the interest and for the benefit of the City acting in its *proprietary capacity*. In other words that notwithstanding the fact that Appellee originally placed its poles and wires in the public streets of the city at locations designated by the Board of Public Works (the "other officer in control thereof" within the meaning of the constitutional provision), that such occupancy is under a mere license from the city which is revocable at any time upon the order of the Board of Public Works. Appellee contends that this condition in the constitutional grant is merely a reservation of the police power of the state; that when Appellee accepted the offer of the state and erected its poles and wires pursuant thereto, the only limitation or condition attaching to the continued exercise of such vested right was the power of the municipality, acting as the agent of the state to enforce under the police power, reasonable regulations affecting Appellee's occupancy of the public streets. That the order and ordinance complained of are not within the police power of the state will be hereafter established.

While it has been repeatedly decided that when federal jurisdiction is invoked on the ground of the impairment of the obligation of a contract, this court will decide for itself without reference to the state decisions the extent

of the contract rights claimed to have been impaired (see Russell v. Sebastian (1913) 233 U. S. 195, 58 L. ed. 912; Perry Co. v. Norfolk (1911), 220 U. S. 422, 55 L. ed. 548; Stearns v. Minn. (1900), 179 U. S. 223, 45 L. ed. 162), it is nevertheless enlightening to consider the construction placed by the courts of the state upon this constitutional grant. The state's construction should be followed when in favor of the grantee.

By adopting this provision of the constitution the people chose to take from the municipality the power to grant or refuse the privilege of using the public streets with or without any condition whatsoever, excepting the right of reasonable regulation under the police power, which of course the state could not barter away and which was expressly reserved to municipalities by the phrase "under the direction of the superintendent of streets or other officer in control thereof." This is clearly the construction placed upon the provision by the Supreme Court of California in the early case of The People v. Stephens (1882), 62 Cal. 209, as well as in the later case of In Re Johnson (1902), 137 Cal. 115.

In the latter case the City of Pasadena had passed an ordinance requiring the securing of a permit before excavations could be made in the public streets under this constitutional provision and the court reviewed the case of People v. Stephens, saying (137 Cal. 120):

> "In People v. Stephens, 62 Cal. 209, the above section was construed by this court to be a direct grant from the people to the persons therein designated of the right to lay pipes in the streets of a city for the purposes specified, without waiting for legislative authority, or being subject to any re-

strictions from that branch of the government, the court saying, with reference to the privilege of laying pipes in the public streets and thoroughfares of any city: 'That privilege is expressly granted by the section of the constitution cited, subject to the direction of the superintendent of streets, or other officer in control thereof, and under such general regulation as the municipality may prescribe for damages and idemnity for damages, and upon the condition that the municipal government shall have the right to regulate the charges thereof.' *The only limitations upon this privilege are those contained in the language in which it is granted,*—viz., that the work shall be done 'under the direction of the superintendent of streets, or other officer in control thereof,' and 'under such general regulations as the municipality may prescribe for damages and indemnity for damages.' Upon a compliance with these conditions, any individual or company duly incorporated for such purpose is given the privilege 'of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light, or with fresh water for domestic and all other purposes.' The municipality may prescribe regulations 'for damages and indemnity for damages,' but these regulations must be 'general'—i. e. uniform—in their application to all who may desire to exercise the privilege.

"The designation of 'damages and indemnity for damages' as the subject upon which the municipality may prescribe regulations in regard to laying the pipes is a limitation upon its authority over the matter, *and a prohibition from prescribing regulations upon any other subject connected with the exercise of the privilege.* When the sovereign authority of the state, either in its constitution or through its legislature, has created a right and expressed and

defined the conditions under which it may be enjoyed, *it is not within the province of a municipality* where such right is sought to be exercised or enjoyed *to impose additional burdens or terms as a condition to its exercise.* The constitution does not authorize the municipality to require a permit as a condition upon which the pipes may be laid in its streets, and its claim of a right to require a permit includes the right to refuse one, and the right to annex one condition to the exercise of the privilege implies the right to annex others, which may at least impair, if not in fact amount to a denial of its exercise. The provision that the work is to be done under the direction of the superintendent of streets gives all the protection for the use of the streets that could be obtained under a permit; and, under the provision authorizing the municipality to prescribe regulations for damages and indemnity for damages, the city will be fully protected against any pecuniary loss or detriment." (Italics supplied.)

It is significant to note that the argument of the City on this point contains no reference whatever to any California decision construing this section of the constitution. The reason is that the Supreme Court of California has uniformly applied the principles enunciated in the case of In Re Johnson. The city therefore is here contending for a construction of the state constitution at variance with the established law of the state in a case in which such construction is in accord with the guaranties of the Federal Constitution instead of being a denial of such rights. It is only under the latter construction that this court may overthrow the state's decisions.

The only cases cited in Appellant's brief in support of its contention relate to the lawful exercise of the police power, which is discussed in the next proposition of this

brief, and under which it will be shown that the exercise of the police power is limited to governmental powers as distinguished from proprietary rights.

B. THE CITY CANNOT DRAW UPON ITS GOVERNMENTAL POWERS TO ENLARGE THE SCOPE OF ITS PROPRIETARY RIGHTS.

Having been restrained by the state courts from interfering with Appellee's poles and wires the City, in adopting the ordinance and order complained of, attempted to draw upon its governmental powers for the benefit of its proprietary operations, and seeks to justify such action upon the grounds of police power and public necessity. This position is untenable because (1) the City is acting in a proprietary capacity, (2) the priority of location of Appellee's distributing system gives priority of right, (3) it is not a valid exercise of the police power and (4) no public necessity is shown to exist.

1. In Constructing and Operating an Electrical Distributing System the City Is not Performing a Governmental Function, but Acting in a Proprietary Capacity.

The distinction between governmental acts and proprietary operations is clearly pointed out by this court in Vilas v. Manila (1911), 220 U. S. 345, 356,; 55 L. ed. 491, 495, where it says that municipal corporations,

> "Exercise powers which are governmental and powers which are of a private or business character. In the one character the municipal corporation is a governmental subdivision, and for that purpose exercises by delegation a part of the sovereignty of the state. In the other character it is a mere legal entity or juristic person. In the latter character it stands for the community in the administration of

local affairs wholly beyond the sphere of the public purpose for which its governmental powers are conferred."

See 28 Cyc. 125:

"When the municipality undertakes to supply, to those inhabitants who will pay therefor, utilities and facilities of urban life, it is engaging in business upon municipal capital and for municipal purposes but not in methods hitherto considered municipal. It is a public corporation transacting private business for hire. It is performing a function, not governmental, but often committed to private corporations or persons, with whom it may come into competition. The function may be municipal but the method is not."

In South Carolina v. United States (1905), 199 U. S. 436, 463; 50 L. ed. 261, 270, this court quotes with approval the following from the opinion of the court in Western Saving Fund Society v. Philadelphia, 31 Pa. 175, 72 Am. Dec. 730, 735:

"'Such contracts are not made by the municipal corporation by virtue of its powers of local sovereignty, but in its capacity of a private corporation. The supply of gaslight is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city, as much so as the lands and houses belonging to it. Blending the two powers in one grant does not destroy the clear and well-settled distinction, and the process of separation is not ren-

dered impossible by the confusion. In separating them, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private corporation. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred'."

In South Pasadena v. Pasadena Land Co. (1908), 152 Cal. 579, 93 Pac. 490, the Supreme Court of California says with reference to a municipal corporation engaged in furnishing water service:

> "In the carrying on of the water service to the people of South Pasadena the City of Pasadena will not be acting in its political, public or governmental capacity as an agent of the sovereign power equal in all respects to the city within which it operates. In administering a public utility, such as a water system, even within its own limits, a city does not act in its public capacity." (152 Cal. 592).

To the same effect:

Chafor v. City of Long Beach, (1917), 174 Cal. 478, 163 Pac. 670;

Vallejo Ferry Co. v. City of Vallejo (1905), 146 Cal. 393, 80 Pac. 514.

In Omaha Water Co. v. City of Omaha (1906, C. C. A., 8th Circuit), 147 Fed. 1, the court said:

> "A city has two classes of powers, the one legislative or governmental, by virtue of which it con-

trols its people as their sovereign, the other proprietary or business, by means of which it acts and contracts for the private advantage of the inhabitants of the city and of the city itself. In the exercise of powers which are strictly governmental or legislative the officers of a city are trustees for the public and they may make no grant or contract which will bind the municipality beyond the terms of their offices because they may not lawfully circumscribe the legislative powers of their successors. But in the exercise of the business powers of a city, the municipality and its officers are controlled by no such rule and they may lawfully exercise these powers in the same way and in their exercise the city will be governed by the same rules which control a private individual or a business corporation under like circumstances. In contracting for the construction or purchase of waterworks to supply itself and its inhabitants with water a city is not exercising its governmental or legislative, but is using its business or proprietary, powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city and for its denizens."

The same result is recognized by McQuillin in his work on Municipal Corporations. He says (Vol. 4, Sec. 1801, p. 3860):

> "The general result is that a municipality, in constructing or in operating its municipal plant acts in a *business* capacity or *individual* capacity rather than in a *legislative* or *governmental capacity*."

In Eaton v. City of Weiser (1906), 12 Idaho 544, 86 Pac. 541, in speaking of the operation by a city of an electric distributing system, the court said:

> "In its proprietary or private character a municipal corporation may engage in enterprises for its

own immediate profit or advantage as a corporation, although inuring ultimately, of course, to the benefit of the public. Of this character are waterworks to supply water to consumers; or gas works to supply gas on payment of rates or tolls, and other similar enterprises." (86 Pac. 543.)

The Supreme Court of Illinois in Eastern Ill. State Normal School v. City of Charleston (1916), 271 Ill. 602, 111 N. E. 573, in considering the operation by the city of a waterworks system, says:

> "In supplying water for the use of the inhabitants for domestic and commercial purposes, a municipality is not in the exercise of a governmental power but *acts in the same capacity as a private corporation*, although the business is carried on for the public advantage, and, being public in its nature, is impressed with a public use." (111 N. E. 575).

See also:

Safety Insulated Wire and Cable Co. v. Baltimore (1895), 66 Fed. 140;

Chicago v. Selz (1902), 104 Ill. App. 376, 381;

Mayor v. Bailey (1845), 2 Den. 433;

Athens v. Miller (1914), 190 Ala. 82, 66 So. 702, 705;

Asher v. Independence (1914), 177 Mo. App. 1, 163 S. W. 574, 576;

Appeal of Brum (1888) Pa., 12 Atl. 855, 856;

Illinois Trust and Savings Bank v. City of Arkansas City (1896), 76 Fed. 271;

Wichita Water Co. v. Wichita (1916), 234 Fed. 415;

City of Seattle v. Stirrat (1909), 55 Wash. 560, 104 Pac. 834;

In re Board of Rapid Transit Com'rs. (1909), 197 N. Y. 81, 90 N. E. 456.

2. As Between Two Electric Distributing Systems Priority of Position Gives Superiority of Right.

Having established that the City in constructing and operating an electric distributing system for supplying customers and consumers for profit is acting in a proprietary capacity, and not performing governmental functions, it becomes necessary to determine the relative rights of Appellee and the City in operating similar utilities upon the same streets.

> "As between two corporations exercising similar functions upon the same street, priority carries superiority of right. Equity will adjust the conflicting interests as far as possible and control both so that each company may exercise its own franchise as fully as is compatible with the necessary exercise of the other. But, if limitation or interference of one or the other are unavoidable, the latter must give way, and the fact that it is under contract with the city for work of a public nature does not alter its position or give it any claim of preference."
>
> *Edison Electric Light & Power Co. v. Merchants & Manufacturers Co.* (1901), 200 Pa. St. 209, 219.

To the same effect:

Edison Electric Co. v. Citizens Electric Co. (1912), 235 Pa. St. 537;

Paris Electric Light Co. v. Southwestern Tel. Co., (1894), 27 S. W. 902.

In Rutland Electric Light Co. v. Marble City Electric Co. (1893), 65 Vt. 377; 26 Atl. 635, it was held that as between two companies operating electric lighting sys-

tems, the company first in occupation of the streets was entitled to a decree restraining the latter company "from maintaining its wires so as to interfere with those of the plaintiff." Notwithstanding that the plaintiff had no exclusive franchise rights in the streets, the Court in its opinion treats as obvious the proposition that the

> "defendant's rights were subordinate to the orator's and must be exercised in such a manner as not to interfere with them."

To the same effect:

Bell Tel. Co. v. Belleville Elect. Co. (1886), 12 Ont. Rep. (Q. B. D.) 571.

3. The Ordinance and Order Are Not a Valid Exercise of the Police Power.

Appellee does not deny that its occupancy of the public streets is subject to a valid exercise of the police power. It claims, however, that this power may not be so extended as to involve, as the ordinance in question has been shown to involve, the taking and damaging of Appellee's property without just compensation for the use and benefit of the City in the operation of its proprietary rights.

The taking of private property under the police power has never been sustained where the property is "innocuous in itself."

Freund, in his work on Police Power, at section 512, page 547, has this to say on the subject:

> "The exercise of the police power can hardly result in appropriation of property by the public, unless it be by way of confiscation as a penalty or for the purpose of destruction; for if the property is

> dangerous, it is dangerous in the hands of the public as well as of the private owner, and if the danger can be met by regulation, such regulation is possible while the property is left to the owner; appropriation can be necessary only where possession is of positive value to the public; and if so, there is really a case of eminent domain."

Citing Proprietors of Mt. Hope Cemetery v. Boston (1893), 158 Mass. 509, where the Court says:

> "That power (the police power) does not extend so far as to include a right to require the transfer of property to another person without compensation."

See also section 511, page 546, of Freund on Police Power, where the author says:

> "Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests; it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful, or as Justice Bradley put it, because 'the property itself is the cause of the public detriment'." (Quoting from Davidson v. New Orleans (1877), 96 U. S. 97, 108; 24 L. Ed. 616, 620.)

In In Re Johnson, supra, the California Supreme Court, in holding invalid an ordinance requiring the securing of a permit to make excavations as a condition precedent to the exercise of the privilege of using the public streets under section 19 of Art. XI of the State Constitution, said:

"The ordinance in question is not an exercise of the police power, nor can it be justified under that authority. The exercise by a municipality of the police power over its streets is limited to the protection of the public in their use of the streets, and does not include a limitation upon their use for any legitimate purpose." (137 Cal. 122.)

In Pacific Telephone & Telegraph Co. v. Eshleman, supra, the Court distinguishes between the exercise of the police power and that of eminent domain, saying:

"But in the exercise of the police power in the regulation of public utilities, while each case which is rested upon the exercise of that power, must be subject to its own individual consideration, there are certain fundamental principles which are not disputed and which govern all. The first of these is that this power goes merely to the regulation of the public utility, and that when an order passes beyond proper regulation it amounts to a taking of the property and the order is then referable not to the police power but to the power of eminent domain. The second of these is that this regulatory power falls into three natural subdivisions: 1. The right to regulate tolls and charges, to the end that fair compensation may be returned and excessive charges be forbidden; 2. The right to prevent discrimination upon the part of the public utility directed against those who employ it, or make use of its agencies, or the commodity which it furnishes; 3. The right to make orders and to formulate rules governing the conduct of the public utility, to the end that its efficiency may be built up and maintained and the public and its employees be accorded desirable safeguards and conveniences. Beyond these matters regulation, as regulation, does not and from the very meaning of the word cannot go. Nor is it of consequence that the law or order be in terms and in form

regulatory, if, in effect, it is a taking of property or a deprivation of the use of property within the meaning of the constitution. No public convenience, no public necessity, however urgent, will justify such a taking. Thus, it might be to the great convenience of the public that a hundred foot strip of a railroad's private right of way should be made into a public crossing and highway. The order of a commission regulating the use upon the part of the railroad of its right of way by exacting of it that it grant permission to the public to cross and recross would not be a regulation, but a confiscation, and this, notwithstanding the fact that the right of way itself was devoted to one public use and the only effort made was to subject it to another public use. (Chicago etc. R. R. Co. v. Chicago, 166 U. S. 226, (41 L. Ed. 979, 17 Sup. Ct. Rep. 581).) In the case cited the order was not even the order of a commission, but was the judgment of a court, yet it was held that the proceedings were in eminent domain and that the railroad company for this new use of its right of way, which amounted to a taking of its property, was denied the compensation to which the constitution entitled it." (166 Cal. 663.)

The cases cited by the City in support of the proposition at page 33 of its brief that "the ordinance and order complained of are also a valid exercise of the police power of the City", all involve an exercise of the police power by the City acting within the scope of its governmental powers. No case has been cited sustaining the proposition that private property may be taken without compensation for public use, for the simple reason there is none.

The case of Merced Falls Gas and Electric Co. v. Turner (1906), 2 Cal. App. 720, principally relied upon

by the city in support of the proposition that the ordinance is a valid exercise of the police power, did not raise the question of the power of a municipality to order changes or relocations of private property in carrying on a proprietary enterprise. The Court states the position of the plaintiff and appellant as follows: "The contention of appellant frankly stated and ably advocated is, that the city authorities are absolutely without power to change the poles from the positions they have occupied for so many years."

The record on appeal in that case is unsatisfactory in that it does not disclose the purpose of the municipality in ordering the changes in location of the poles in question. However, it is apparent from a reading of the opinion that the changes were in furtherance of street improvement work. The Court says at page 725 that "Respondent's brief contains the statement that a change in the location of the poles is rendered necessary by the construction of artificial stone sidewalks on the street," but adds that "this statement cannot be considered as a fact in the case" evidently because the record on appeal did not disclose the reason or necessity for such changes. It is apparent that such was the case from the bald contention of appellant that "the city authorities are absolutely without power to change the poles from the positions they have occupied for so many years." This was the question presented to the Court: Whether *under any circumstances* the municipal authorities had the power to order a change in location of appellant's poles, and the Court there correctly held that appellant's contention was untenable, pointing out as "consequences which would inevitably follow the application of the doctrine

for which appellant contends" that "If poles upon which telegraph, telephone and other wires are strung must be allowed to remain where they were first located, *public* improvements and conveniences, made necessary by changed conditions, may be hindered or rendered impossible." To have held otherwise under the issues in that case would have placed the appellant above the police power of the State.

The *public* improvements in the mind of the Court in that case were improvements carried out by the city under its governmental powers, such as the opening and widening of streets, the construction of sewers, sidewalks, drainage systems, etc. There is no pretense that the ordinance in this case is in furtherance of any of these *public* improvements. It is purely an attempt to draw upon the governmental powers of the city to aid the city in constructing and operating a rival electric system—to engage in business in competition with Appellee and to use the police power as a cloak under which to harass, injure and take the property of its competitor. If the familiar constitutional guaranties do not under such conditions afford protection to private property, then such constitutional immunities are mere shambles, and there is nothing with which to check the rapacity of municipal greed. But, as was said by the Court in State v. Missouri Pacific R. Co. (1912), 147 S. W. 118, 121:

> "The police power cannot be made a cloak under which to overthrow or disregard constitutional rights."

Another case relied upon by the city is Louisville Home Telephone Co. v. Cumberland Telephone and Telegraph

Co. (1901), 111 Fed. 663, cited in Appellants' brief at page 41. This case merely holds that the city in exercising control of its streets under the police power, may make provision for the utilization and enjoyment of *unoccupied* space by an incoming utility. Although not possessing an exclusive franchise, the older company sought to *prevent* the new company from occupying the streets *at all*, under the contention that the erection of its poles and cross arms gave it an absolute and exclusive right to space the width of its cross arms (8 feet) upwards *ad infinitum* and that no other wires might be placed within this space no matter how free from interference with plaintiff's property.

How different was that "dog-in-the-manger" attitude to the position of Appellee in this case. Appellee does not ask that the City be prohibited from erecting its poles and wires, but that it be merely restrained from *taking* and *damaging* Appellee's property in so doing—not that it even be prevented from erecting its poles and wires on the same side of the street on which are located the similar structures of Appellee, but only that it be required to respect the superior rights of Appellee acquired by priority of location. As is shown by the evidence:

> "There is no reason from a construction or mechanical standpoint, why the City of Los Angeles should not have installed a pole ten feet higher, and if they had done so, they would have cleared the wires of the plaintiff corporation. The extra ten feet would cost the city about $4.50." (R. p. 94.)

Running all through the brief for Appellants are cases cited in support of its claim of right to take Appellee's

property without compensation in the interest of the City's proprietary operations. Most of these cases were presented in the argument at the trial and may be disposed of in the words of the opinion of the judge below, where he says (R. p. 127, 241 Fed. 921):

> ". . . the merest reading of those cases will show they announce no doctrine different from that accepted herein, towit: that a public service corporation like the plaintiff, in the performance of its duty to the public under franchise or other similar contract, has no right to any particular location in or upon the public streets or highways, but that it is at all times subject to the police power of the state and subject to such general regulations as may arise from and spring out of the necessities of the public welfare and convenience. Neither of these cases, however, and none that have been cited or to which the attention of the court in its labors has been directed, may be said to go to the extent that a city or other sovereign functionary, having embarked upon a business venture, may assert its sovereign power merely for the purpose of enabling it successfully to install its own properties and in violation of superior rights of location belonging to a competitor because of priority of installation."

4. Public Necessity Will Not Justify the Taking of Private Property Without Just Compensation.

In Pacific Telephone etc. Co. v. Eshleman, supra, in defining the scope of the police power in the regulation of public utilities, the Court states there are certain "indisputable principles" and says:

> "The first of these is that this power goes merely to the *regulation* of the public utility, and that when an order passes beyond proper regulation it amounts to a taking of the property and the order is then

> referable not to the police power but to the power of eminent domain. * * * Nor is it of consequence that the law or order be in terms or in form regulatory, if, in effect, it is a taking of property or a deprivation of the use of property within the meaning of the Constitution no public convenience, no public necessity, however urgent, will justify such a taking." (166 Cal. 663.)

The city uses the term "public necessity" in the sense of "public expediency". It was not *necessity* which induced the order to make the changes in Appellee's poles and wires referred to in the evidence at p. 94 of the Record, but it was *expedient* to do so because "the extra ten feet would cost the city about $4.50" for each higher pole required to clear the wires on Appellee's poles.

However, it is unnecessary to pursue this inquiry further, because, in the words of the trial judge (R. p. 123, 241 Fed. 916):

> "* * * Conceding for purposes of argument merely, that a public necessity could exist sufficient to entitle the city to assert such an authority over private property, it suffices, in my judgment, to state that no such necessity has been shown to exist in this controversy.
>
> "If it were true that privately owned utility companies were occupying the streets of the City of Los Angeles to the exclusion of any new entrant therein, and that they were either refusing or were unable adequately to provide for the lighting of the city, it might be that such a situation would justify, under the police power of the city, the assertion of the authority contemplated in the ordinance under consideration. This court, however, because of its knowledge of local conditions will take judicial notice, and in fact it is demonstrated by the very language of the ordinance itself, that there are at

the present time several companies engaged in generating and furnishing electrical energy in the city and to its inhabitants. The suggestion is nowhere made, much less substantiated by evidence, that there is any such present or probable inadequacy in the matter of supplying of such energy as to justify the finding, or the inference, that the city itself is compelled, on grounds of 'public necessity,' to go into the business of furnishing light to itself and its inhabitants. The very ordinance recites that 'various persons, firms and corporations are maintaining in the public streets and other public places of said city, poles, anchors, cross arms, wires, street lamps and other fixtures, appliances and structures, and it is necessary in order that sufficient space may be secured for said municipal electrical system in said public streets and public places, and that the work of constructing and establishing the same may be carried on, to provide for the removal or relocation of certain of said poles and other properties so maintained by said persons and corporations.' This language of the ordinance, which no doubt was framed in view of existing conditions, tells its own story in illuminating fashion, and demonstrates that there is no real 'public necessity' for the city engaging in the business of furnishing light. The only 'necessity' existing is that in order that the city system may be installed as planned, other systems now in place shall be moved. Indulging in the obvious inferences justified by the language of the ordinance, under the law and from the conditions easily observable, the court must assume, in the absence of evidence of a persuasive nature to the contrary, that with the regulatory powers of the law at hand, (Price v. Riverside (1880), 56 Cal. 431; Pinney & Boyle Co. v. L. A. Gas Corp. (1914), 168 Cal. 12, 15; Russell v. Sebastian (1914), 233 U. S. 195, 208; 26 Cyc. 377) the city could compel the companies oper-

ating within its confines to furnish sufficient light for its inhabitants at a fair and reasonable remuneration therefor.

"In so construing the situation the court conceives that it is giving to the phrase 'public necessity' the meaning usually accorded to it when dealing with the police power. I doubt not that the city has embarked upon the venture of furnishing and distributing electrical energy with perfect and commendable propriety. I doubt not that after careful and painstaking investigation it has been found that the city may engage in this undertaking with profit to itself and to its inhabitants. I am assuming that, ultimately and in due course, the public welfare and the public convenience and the public exchequer will be augumented by this indulgence in municipal activity. I am simply stating, however, what seems to me to be the obvious, that the motives which prompted this undertaking have been those of propriety and expediency rather than those of necessity, as that term is defined and understood by those who have to do with the construing of the police power."

IV.

THE VALUE OF APPELLEE'S RIGHTS IN THE STREETS IS DETERMINATIVE OF THE JURISDICTION OF THIS COURT.

Defendants in their answer allege that the matter in controversy in this case, exclusive of interest and costs, does not exceed the value of $100. (R. p. 58), and defendants claimed below that the trial court did not have jurisdiction in the case. During the trial it was stipulated "that the value of the right to exercise the franchises of the Los Angeles Gas and Electric Corporation in the public streets and thoroughfares of the city of Los

Angeles exceeded the sum of $3000. and was in excess of $4000." (R. p. 110.)

The evidence shows that it would cost Appellee between $50,000 and $60,000 if the city proceeds to install its electrical apparatus throughout the city and requires conformity in all places where it approaches in close proximity to the apparatus of plaintiff as is attempted to be required in the particular instance under review. (R. p. 109.) The contention of the defendants below was that the amount in controversy is not the value of Appellee's franchise but is the cost to Appellee of making the changes on York Boulevard specified in the order from the Board of Public Works, which concededly would be less than the jurisdictional amount.

This brings the case squarely within the principle laid down in Glenwood Light & Water Co. v. Mutual Light, Heat and Power Co. (1915), 239 U. S. 121, 60 L. Ed. 174, which was a suit in equity to restrain defendant from interfering with plaintiff's electric overhead distributing system. Jurisdiction of the Federal Court was invoked on the ground that the suit was between citizens of different states and that the matter in controversy exceeded the sum or value of $3,000. The district court dismissed the bill for want of jurisdiction, holding that the jurisdictional amount was fixed by the cost to defendant of removing its poles and wires in the streets and alleys where they conflicted or interfered with the poles and wires of plaintiff.

In reversing the decision of the lower Court, this Court said:

> "The district court erred in testing the jurisdiction by the amount that it would cost defendant to

remove its poles and wires where they conflict or interfere with those of complainant, and replacing them in such a position as to avoid the interference. Complainant sets up a right to maintain and operate its plant and conduct its business free from wrongful interference by defendant. This right is alleged to be a value in excess of the jurisdictional amount, and at the hearing no question seems to have been made but that it has such value. The relief sought is the protection of that right, now and in the future, and the value of that protection is determinative of the jurisdiction."

CONCLUSION.

It is fitting that this brief should conclude with the closing words of Judge Bledsoe in his learned opinion delivered at the time of final judgment below:

> "I am . . . firmly of the belief that until the city, by purchase, appeal to eminent domain, or otherwise has lawfully and properly and justly eliminated competition, it must meet its competitors as any other private agency would be compelled to meet them, and must stand with them in the same relation to the law and let its success be measured by its ability satisfactorily to serve the public, rather than by its power through the exertion of public functions to occupy a position of supremacy in the field which it deliberately has chosen to invade."

Respectfully submitted,

PAUL OVERTON,
HERBERT J. GOUDGE,
Counsel for Appellee.

Los Angeles, September, 1919.

CITY OF LOS ANGELES ET AL. *v.* LOS ANGELES GAS & ELECTRIC CORPORATION.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

No. 50. Argued October 23, 1919.—Decided December 8, 1919.

A distinction is to be drawn between the powers of a city when acting in its governmental capacity, i. e., the police powers,—and those which belong to it in its proprietary or quasi-private capacity. P. 38.

Merely for the sake of establishing a lighting system of its own, a city has no right to displace or remove without compensation the fixtures of a lighting company already occupying the streets in virtue of rights guaranteed by its franchise. P. 37.

Declarations in an ordinance to the effect that speedy establishment of a municipal lighting system, and therein the removal or relocation of poles and other fixtures maintained in the streets by the owners of other lighting systems, are necessary for the public peace, health

and safety, do not suffice to convert such acts of interference into a legitimate exercise of police power. Pp. 34, 38.

A franchise to use the streets for supplying a city and its inhabitants with electric light, acquired under the California Constitution, Art. XI, § 19, before the amendment of 1911, conveys contract rights which the city is not at liberty to destroy, and the property employed in their exercise can not be taken by the city without due process of law—the payment of compensation. P. 39. *Russell* v. *Sebastian*, 233 U. S. 195.

241 Fed. Rep. 912, affirmed.

THE case is stated in the opinion.

Mr. W. B. Mathews, with whom *Mr. Albert Lee Stephens* and *Mr. Charles S. Burnell* were on the briefs, for appellants.

Mr. Paul Overton, with whom *Mr. Herbert J. Goudge* was on the brief, for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

The appellant city is a municipal corporation of the State of California and the other appellants are its officers, having official relation to it and its rights and powers.

The appellee is a California corporation invested with and in exercise of a franchise for generating and selling electricity through a system of poles and wires and other works in the public streets of Los Angeles, among others in that known as York Boulevard.

The appellee—to which we shall refer as the corporation—brought this suit in the District Court to declare invalid and restrain the execution of an ordinance of the city providing for a municipal electric street-lighting system and making way for it in such way, it is charged, that it obstructed, trespassed upon and made dangerous

the system of the corporation in violation of its rights under the Constitution of the United States.

The District Court granted the prayer of the bill upon the grounds relied on and hence the appeal from its decision direct to this court.

The ordinance attacked is very long by reason of its repetitions. It, however, can be intelligibly reduced to a few provisions. It was passed March 6, 1917, and approved the next day, and declares in its title its purpose to be to provide for the removal and relocation of poles and other property in the public streets of the city "when necessary in order that the municipal electrical street lighting system may be constructed, operated and maintained." Such system and its installation "as speedily as may be practicable" is declared necessary for "the public peace, health and safety."

It is recited that certain "fixtures, appliances and structures" (they are enumerated) are maintained in the streets and it is necessary "in order that sufficient space may be secured for said municipal electrical system . . . and that the work of constructing and establishing the same may be carried on, to provide for the removal or relocation of certain of said poles and other properties so maintained by said persons and corporations."

It is therefore ordained that (§ 1) whenever it shall appear to the Board of Public Works that the removal or relocation of such "fixtures, appliances or structures" (there is an enumeration again which we omit as useless repetition) is necessary in order that the municipal system may have place, the Board shall give notice to the person, firm or corporation owning or controlling the property to remove or relocate the same, the notice to designate the property to be removed and the place to which it shall be removed, and it shall be the duty of such person, firm or corporation to comply with the notice within five days of its receipt. To fail or refuse to so

comply or to diligently prosecute the work of removal is made unlawful (§§ 2 and 3) and (§ 4) made a misdemeanor punishable by a fine of not more than $500 or by imprisonment in the city jail for a period of not more than six months, or by both such fine and imprisonment. Each day's delay is made a separate offense.

In case of failure to remove or prosecute the work of removal the Board of Public Works is given power to do what the notice directs. (§ 5.)

By § 6 the dependency of the city upon private contracts for lighting the public streets and other public places is declared, some of which contracts, it is said, have expired and all will have expired by July, 1917, thus making the completion of the municipal system necessary to provide for lighting the streets without interruption and the removal or relocation of the appliances owned or controlled by various persons, firms or corporations immediately necessary in order that the city may complete and install its system. And it is declared that the "ordinance is urgently required for the immediate preservation of the public peace, health and safety."

The ordinance was preceded by acts of interference by the city with the property of the corporation in other streets and also in York Boulevard, which interference was enjoined by interlocutory and final decree by the Superior Court of Los Angeles County in a suit brought by the corporation—the city not defending. And it was interference, not displacement, and the court's decree was adapted to the extent of the interference. The decree as to other streets than York Boulevard was as follows: ". . . from in any manner trespassing upon, interfering with, moving or displacing the poles or wires, or either or any of them, owned or controlled wholly or in part by plaintiff [the corporation in this case]; or erecting or placing any pole, cross-arm or other electrical appliance or equipment or attaching any wire or cable to or upon

any pole, cross-arm or other electrical appliance or equipment in a fixed position within the distance from any pole, cross-arm, wire or other electrical appliance or equipment owned or controlled wholly or in part by plaintiff, [the corporation in this case], as prescribed by the laws of the State of California and the rules and regulations of the Railroad Commission of said State; . . ." As to York Boulevard the decree was as follows: ". . . from conveying, running or transmitting electric power or energy through the lines and wires heretofore erected and constructed by said City of Los Angeles, its agents, servants or employees," until the wires, poles, and equipment of the city are removed to the distance "prescribed by the laws of the State of California and the rules and regulations of the Railroad Commission thereof."

The decree contained a provision upon which the city bases a contention, or rather a suggestion, to which we shall presently refer. The provision is as follows: "Nothing herein contained shall be construed as prohibiting or restraining the City of Los Angeles or its proper boards, officers or agents from carrying into effect any ordinance of said City providing for the removal or relocation of poles, anchors, cross arms, wires, street lamps or other fixtures, appliances or structures owned or controlled by said plaintiff [the corporation in this case] and located in, upon, over or under any public street or other public place of said city."

The ground or basis of the ordinance of March 6, 1917, here involved is the same as that of the interference in the suit in the state court, that is, the right to displace the corporation's property in order that the municipal system may be operated or erected. There is no attempt here, as there was no attempt in that suit, at absolute displacement. The order of the Board of Public Works, issued in accordance with the direction of the ordinance, required the corporation to change or shift or lower its wires to

the detriment of their efficient use, as it is contended. There is some conflict as to the extent and effect which, however, we are not called upon to reconcile. It was stipulated "that the value of the right to exercise the franchises of the Los Angeles Gas & Electric Corporation in the public streets and thoroughfares of the City of Los Angeles exceeded the sum of $3,000 and was in excess of $4,000." And it was testified that if the city in constructing its system proceeds as it has done in ordering the removal of poles and wires, it will cost the corporation between $50,000 and $60,000; but passing by the particular instance of interference and considering the ordinance's broad assertion of right, the contentions of the city and the corporation are in sharp contradiction.

We say "the ordinance's broad assertion of right" to distinguish the narrower right of the city to erect a system of its own. Of the latter right there is no question. The District Court conceded it, indeed praised the project, but decided that it could not be exercised to displace other systems, without compensation, occupying the streets by virtue of franchises legally granted. Thus the only question is whether the city may as matter of public right and without compensation clear a "space" for the instrumentalities of its system by removing or relocating the instrumentalities of other systems. The city asserts the affirmative—asserts the right to displace other systems as an exercise of the police power, and, further, as an incident of its legislative power. It is further asserted that these powers are attributes of government, and that their exercise when not palpably arbitrary, is not subject to judicial interference. "And that 'every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the law-making power [in this case the city]; and a contrary conclusion will never be reached upon light consideration.'" *Ex parte Haskell*, 112 California, 412.

In counter propositions the corporation urges its franchise and the right it conveys to occupy the streets of the city—rights, it is said, having the inviolability of a contract and the sanctity of private property, not indeed free from reasonable regulation, if such regulation is governmental, but free from molestation or displacement to make "space" for a city system, for that is proprietary. We have, therefore, the not unusual case of rights asserted against governmental power—a case somewhat fruitful of disputable considerations and upon which judgment may not be easy or free from controversy. But there is some point where power or rights must prevail, however plausible or specious the argument of either against the other may be. As for example, in the present case. The city has undoubtedly the function of police; it undoubtedly has the power of municipal lighting and the installation of its instrumentalities (*Russell* v. *Sebastian*, 233 U. S. 195, 202); but function and power may be exceeded and so far as wrongful be restrained. And such was the conclusion of the District Court applying the Constitution of the United States, and such the ground of its judgment.

In what way the public peace or health or safety was imperiled by the lighting system of the corporation or relieved by its removal or change, the court was unable to see and it is certainly not apparent. The court pointed out that there were several lighting systems in existence and occupying the streets and that there was no contest, or disorder or overcharge of rates or peril, or defect of any kind, and therefore concluded that the conditions demonstrated that while the city might install its own system there was no real "public necessity" arising from consideration of public health, peace or safety requiring the city to engage in the business of furnishing light.

The court reasoned and concluded that what the city did was done not in its governmental capacity—an exertion of the police power—but in its "proprietary or quasi-

private capacity" and that therefore the city was subordinate in right to the corporation, the latter being an earlier and lawful occupant of the field. The difference in the capacities is recognized and the difference in attendant powers pointed out in decisions of this court. *Vilas* v. *Manila*, 220 U. S. 345; *Russell* v. *Sebastian*, 233 U. S. 195; *South Carolina* v. *United States*, 199 U. S. 437; *New Orleans Gas Co.* v. *Drainage Commission*, 197 U. S. 453; *Vicksburg* v. *Vicksburg Waterworks Co.*, 206 U. S. 496, 508.

The city's contentions are based on a confusion of these capacities and the powers or rights respectively attributed to them and upon a misunderstanding of the reservations in the decree of the state court. The reservations were made only in prudence, not to define the existence or extent of powers, and forestall their challenge, but to leave both to the occasion when either of them might be asserted or denied. And it is clear that it was not intended to confound the capacities in which the city might act and the relation of the city's acts to those capacities.

It is not necessary to repeat the reasoning or the examples of the cases cited above, by which and in which the different capacities of the city are defined and illustrated. A franchise conveys rights and if their exercise could be prevented or destroyed by a simple declaration of a municipal council, they would be infirm indeed in tenure and substance. It is to be remembered that they come into existence by compact, having, therefore, its sanction, urged by reciprocal benefits, and are attended and can only be exercised by expenditure of money, making them a matter of investments and property, and entitled as such against being taken without the proper process of law—the payment of compensation.

The franchise of the present controversy was granted prior to 1911 and hence has the attributes and rights described in *Russell* v. *Sebastian*, *supra*. Its source, as was that of the franchise in that case, is the constitution of

the State and is that "of using the public streets and thoroughfares thereof . . . for introducing into and supplying" a city "and its inhabitants either with gas light or other illuminating light." We said of such that the "breadth of the offer was commensurate with the requirements of the undertaking which was invited. The service to which the provision referred was a community service. It was the supply of a municipality—which had no municipal works—with water or light." And again, "The individual or corporation undertaking to supply the city with water or light was put in the same position as though such individual or corporation had received a special grant of the described street rights in the city which was to be served." We can add nothing to this definition of rights, and, we may repeat, they did not become immediately violable or become subsequently violable.

It will be observed that we are not concerned with the duty of the corporation operating a public utility to yield uncompensated obedience to a police measure adopted for the protection of the public, but with a proposed uncompensated taking or disturbance of what belongs to one lighting system in order to make way for another. And this the Fourteenth Amendment forbids. What the grant was at its inception it remained and was not subject to be displaced by some other system, even that of the city, without compensation to the corporation for the rights appropriated.

We think, therefore, that the decree of the District Court protecting the corporation's rights from disturbance under the ordinance in question must be and it is

Affirmed.

MR. JUSTICE PITNEY and MR. JUSTICE CLARKE dissent.